TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible]37

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

OCHOA FERTILIZER CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1961
CERTIORARI GRANTED MARCH 6, 1961

Supreme Court of the United States

OCTOBER TERM, 1960

No. 654

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

OCHOA FERTILIZER CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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[fol. 1] (File endorsement omitted)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER—Filed June 26, 1958

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space

Case No.—24-CA-1038
Date Filed—June 26, 1958
Compliance Status Checked By:

1. *Employer Against Whom Charge Is Brought*

NAME OF EMPLOYER—Ochoa Fertilizer Corporation

NUMBER OF WORKERS EMPLOYED—200

ADDRESS OF ESTABLISHMENT (Street and number, city, zone, and State)—Guánica, P. R. and Stop 27½, Hato Rey, P. R.

TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.) factory

Identify principal product or service—fertilizer

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (List subsections) (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. *Basis of the Charge* (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about June 8, 1958 and at all times thereafter the above named employer failed and refused to offer and give Juan Padilla, the below named charging individual, his regular employment at the behest of Local 1762, International Longshoremen Association and for reasons other than his lack of membership in said labor organization.

By the above and by other acts and conduct the above named employer has interfered, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act as amended.

3. *Full Name of Party Filing Charge* (if labor organization, give full name, including local name and number)—
Juan Padilla

4. *Address* (Street and number, city, zone, and State)—
P. O. Box 954, Ensenada, P. R.
Telephone No.—

5. *Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit* (To be filled in when charge is filed by a labor organization)

6. *Address of National or International, if any* (Street and number, city, zone, and State)—
Telephone No.—

7. *Declaration*—

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Juan Padilla JUAN PADILLA

(Signature of representative or person filing charge)

(Date)—June 26, 1958

(Title, if any)—an individual

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80)

CAM/rnp

[fol. 2] 27 June 1958

Ochoa Fertilizer Corporation
24-CA-1038

Ochoa Fertilizer Corporation
Guanica, Puerto Rico

Gentlemen:

The above captioned case alleging that your company has engaged in unfair labor practices pursuant to the National Labor Relations Act, as amended, has been filed by Juan Padilla.

The investigation of this charge has been assigned to one of our examiners who in due time shall contact you. Meanwhile, I shall appreciate your giving me details and circumstances which according to you surround the above mentioned case.

Please give also the following information:

1. Approximate figures concerning the operations of your business in and outside Puerto Rico;
2. Information as to the volume, value and proportion of materials purchased or brought from places outside Puerto Rico to be used in the establishment involved;
3. Similar information about the products sold or shipped to places outside Puerto Rico;
4. If your company is engaged in defense work.

Very truly yours,

Salvatore Cosentino
Regional Director

Encl. Copy of Charge

Registered Mail—Return Receipt Requested

I Certify that I served the above referred to charge this day by postpaid registered mail on the addressee named above, together with a transmittal letter of which this is a true copy.

/s/ Victor Hartington

Subscribed and sworn to before me this 27 day of June, 1958.

/s/ Clara Dorner
Designated Agent

• • • •

[fol. 3] (File endorsement omitted)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS—
Filed June 26, 1958

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS: File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space

Case No.—24-CB-271
Date Filed—June 26, 1958
Compliance Status Checked By:

1. *Labor Organization or Its Agents Against Which Charge Is Brought*

NAME—Local 1762, International Longshoremen Association, District Council of the Ports of P. R., ILA IND.

ADDRESS—P. O. Box 251, Ensenada, P. R.

The above-named organization(s) or its Agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b) Subsection(s) (List subsections) (1)(A)(2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. *Basis of the Charge* (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about June 8, 1958 and at all times thereafter the above named labor organization, through its President, caused or attempted to cause Ochoa Fertilizer Corporation to discriminate against Juan Padilla, the below named charging individual, by failing and refusing to notify him of his regular work opportunity at said company and for reasons other than his failure to maintain membership in said labor organization.

By the above and by other acts and conduct the above named union has restrained and coerced the employees of the above referred to company in the exercise of their rights guaranteed by Section 7 of the Act.

3. *Name of Employer*—Ochoa Fertilizer Corporation
4. *Location of Plant Involved* (Street, City, and State) Guánica, P. R. Stop 27½, Hato Rey, P. R.
5. *Type of Establishment* (Factory, mine, wholesaler, etc.)—factory
6. *Identify Principal Product or Service*—fertilizer
7. *No. of Workers Employed*—200
8. *Full Name of Party Filing Charge*—Juan Padilla (an individual)
9. *Address of Party Filing Charge* (Street, City, and State)—P. O. Box 954, Ensenada, P. R.
10. *Tel. No.*—
11. *Declaration*—

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Juan Padilla JUAN PADILLA

(Signature of representative or person making charge)

(Date)—June 26, 1958
(Title or office, if any)—an individual

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

CAM/rnp

[fol. 4] (File endorsement omitted)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST EMPLOYER—Filed Nov. 26, 1958

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space

Case No.—24-CA-1038
Date Filed—November 26, 1958
Compliance Status Checked By:

1. *Employer Against Whom Charge Is Brought*

NAME OF EMPLOYER—Ochoa Fertilizer Corporation

NUMBER OF WORKERS EMPLOYED—200

ADDRESS OF ESTABLISHMENT (Street and number, city, zone, and State)—P. O. Box 117 Hato Rey, Puerto Rico

TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.) factory

Identify principal product or service—manufactures chemical fertilizer

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1), (List subsections) (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. *Basis of the Charge* (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

1. The above named Employer since on or about December 26, 1957 and at all times thereafter has maintained in effect and enforced closed shop provisions contained in a contract executed with International Longshoremen Association, District Council of the Ports of P.R., and its Local 1762, International Longshoremen Association, District Council of the Ports of P. R. ILA-IND (also known as Union de Estibadores de Guánica, IBL SubLocal 1900), on July 19, 1951 for a period of five years which was extended for an additional five years on September 5, 1955.

2. The above named Employer since on or about December 26, 1957 has maintained in effect and applied an unlawful hiring hall arrangement contained in a contract with International Longshoremen Association, District Council of the Ports of P. R. and its Local 1762, International Longshoremen Association, District Council of the Ports of P. R., ILA-IND, (also known as Unión de Estibadores de Guánica, IBL SubLocal 1900), executed on July 19, 1951 for a period of five years which was extended for an additional five years on September 5, 1955.

3. Since on or about December 26, 1957 the above named Employer engaged in a practice, based on an understanding, arrangement or agreement with International Longshoremen Association, District Council of the Ports of P. R., and its Local 1762, International Longshoremen Association, District Council of the Ports of P. R., ILA-IND (also known as Unión de Estibadores de Guánica, IBL SubLocal 1900), whereby only members of said labor organizations are given employment at stevedoring and related occupations at its pier in Guánica, P. R. and whereby only employees, or applicants for employment presenting union membership or union clearance cards are given employment in the loading or unloading of ships for said Employer at said pier.

4. By the above and by other acts and conduct the Employer has interfered with, restrained and coerced its em-

ployees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act, as amended.

3. *Full Name of Party Filing Charge* (if labor organization, give full name, including local name and number)—Juan Padilla (an individual)

4. *Address* (Street and number, city, zone, and State)—P. O. Box 954, Ensenada, P. R.

Telephone No.—

5. *Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit* (To be filled in when charge is filed by a labor organization)

6. *Address of National or International, if any* (Street and number, city, zone, and State)—

Telephone No.—

7. *Declaration*—

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Juan Padilla JUAN PADILLA

(Signature of representative or person filing charge)

(Date)—November 26, 1958

(Title, if any)—an individual

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80)

CAM/rnp

[fol. 5] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS—Filed Nov. 26, 1958

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS: File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space

Case No.—24-CB-271
Date Filed—November 26, 1958
Compliance Status Checked By:

1. *Labor Organization or Its Agents Against Which Charge Is Brought*

NAME—International Longshoremen Association, District Council of the Ports of P.R., ILA-IND and Local 1762, International Longshoremen Association, District Council of the Ports of P. R., ILA-IND. (also known as Unión de Estibadores de Guánica, IBL SubLocal 1900)

ADDRESS—Box 2374, San Juan, P. R. and Box 251, Ensenada, P. R.

The above-named organization(s) or its Agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b) Subsection(s) (List subsections) (1)(A) & (2) of the National Labor Relations Act, and these unfair labor practices are

unfair labor practices affecting commerce within the meaning of the Act.

2. *Basis of the Charge* (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

1. The above named labor organizations since on or about December 26, 1957 and at all times thereafter have maintained in effect and enforced closed shop provisions contained in a contract executed with Ochoa Fertilizer Corporation on July 19, 1951 for a period of five years which was extended for an additional five years on September 5, 1955.

2. The above named labor organizations since on or about December 26, 1957 have maintained in effect and applied an unlawful hiring hall arrangement contained in a contract with Ochoa Fertilizer Corporation executed on July 19, 1951 for a period of five years which was extended for an additional five years on September 5, 1955.

3. Since on or about December 26, 1957 the above named labor organizations have engaged in a practice, based on an understanding, arrangement or agreement with Ochoa Fertilizer Corporation whereby only members of said labor organizations are given employment at stevedoring and related occupations at Ochoa Fertilizer Corporation's pier in Guánica, P.R., and whereby only employees or applicants for employment presenting said union's membership or clearance cards are given employment in the loading or unloading of ships for said Ochoa Fertilizer Corporation at its Guánica, P. R. pier.

4. By the above and by other acts and conduct the aforementioned labor organizations have restrained and coerced employees or prospective employees of Ochoa Fertilizer Corporation in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act, as amended.

3. *Name of Employer*—Ochoa Fertilizer Corporation

4. *Location of Plant Involved* (Street, City, and State) Guánica, P. R.

5. *Type of Establishment* (Factory, mine, wholesaler, etc.)—factory

6. *Identify Principal Product or Service*—manufactures chemical fertilizer

7. *No. of Workers Employed*—200

8. *Full Name of Party Filing Charge*—Juan Padilla (an individual)

9. *Address of Party Filing Charge* (Street, City, and State)—P. O. Box 954, Ensenada, P. R.

10. *Tel. No.*—

11. *Declaration*—

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Juan Padilla JUAN PADILLA

(Signature of representative or person making charge)

(Date)—November 26, 1958

(Title or office, if any)—(an individual)

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

CAM/rnp

[fol. 6]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
24TH REGION

Case No. 24-CA-1038

In the Matter of

OCHOA FERTILIZER CORPORATION

and

JUAN PADILLA

and

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-IND., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762, DCPPR, ILA-IND., (also known as UNION DE ESTIBADORES DE GUANICA, IBL SUBLOCAL 1900)

Parties to the Contract

Case No. 24-CB-271

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-IND., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762, DCPPR, ILA-IND., (also known as UNION DE ESTIBADORES DE GUANICA, SUBLOCAL 1900)

and

JUAN PADILLA

and

OCHOA FERTILIZER CORPORATION

Party to the Contract

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT and NOTICE OF HEARING—Feb. 26, 1959

It having been charged by Juan Padilla (herein called Padilla) against Ochoa Fertilizer Corporation (herein called Respondent Company) in Case No. 24-CA-1038; and against International Longshoremen's Association, Local

1762, DCPPR, ILA-IND., (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900) (herein called [fol. 7] Respondents ILA Council and ILA Local 1762) in Case No. 24-CB-271, that said Respondents have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board (herein called the Board) by the undersigned Regional Director for the Twenty-Fourth Region, having duly considered the matter and deemed it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs and delay,

IT IS HEREBY ORDERED, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 7, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10 (b) of the Act and the Board's Rules and Regulations, Series 7, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

I

A copy of the charge filed on June 26, 1958 in Case No. 24-CA-1038 was served by registered mail upon the Respondent Company on June 27, 1958. A copy of the first amended charge filed on November 26, 1958 was served by registered mail upon the Respondent Company on December 1, 1958.

A copy of the charge filed on June 26, 1958 in Case No. 24-CB-271 was served by registered mail upon the Respondents ILA Council and ILA Local 1762 on June 27, 1958. A copy of the first amended charge filed on November 26, 1958 was served by registered mail upon the Respondents ILA Council and ILA Local 1762 on December 1, 1958.

[fol. 8] II

Ochoa Fertilizer Corporation is a corporation of the Commonwealth of Puerto Rico with its principal place

of business and plant located at Hato Rey, P.R., where it is engaged in the manufacture of chemical fertilizers. In connection with its business operations it also maintains a fertilizer manufacturing plant, warehouse and dock facilities at the port of Guanica, P.R. At its dock in Guanica, P.R., it receives and unloads ships which bring materials necessary for its manufacturing operations. During the year 1958 it imported chemicals and other materials which were valued at in excess of $4,000,000. During the same period it exported fertilizers and other products valued at in excess of $100,000. Its annual volume of business is in excess of $8,000,000.00.

III

Ochoa Fertilizer Corporation is, and at all times material herein has been, engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

IV

Respondents ILA Council and ILA Local 1762 are each labor organizations within the meaning of Section 2, subsection (5) of the Act.

V

Respondent ILA Local 1762 is an affiliate of the ILA Council, which Council exists in part for the purpose of representing local unions which are affiliated therewith, including Respondent ILA Local 1762, in the negotiation, execution and administration of collective bargaining contracts for itself and on behalf of its affiliated Locals, including the Respondent ILA Local 1762.

[fol. 9]

VI

On or about July 19, 1951 Respondent ILA Council acting for itself and on behalf of its affiliate Respondent ILA Local 1762, executed a collective bargaining contract with the Respondent Company relating to the hire, terms and conditions of employment of the stevedores and related workers employed by said company at its dock located at the port of Guanica. Said contract was exe-

cuted for a term of 5 years to expire on December 31, 1955. On or about Sept. 5, 1955 Respondent ILA Council acting for itself and on behalf of its Local 1762 executed a Stipulation Agreement with the Respondent Company extending the terms of the contract of July 19, 1951 for an additional period of 5 years, until December 31, 1960.

VII

The collective bargaining contract of July 19, 1951 referred to above, as extended by the Stipulation Agreement of Sept. 5, 1955, contains *inter alia* an agreement whereby all employees or applicants for work as stevedores or other related work at the dock of the Respondent Company at the port of Guanica are required to be members of Respondent ILA Local 1762 as a condition of employment.

VIII

The contract of July 19, 1951 referred to above, as extended by the Stipulation Agreement of Sept. 5, 1955, also contains an agreement whereby the Respondent Company is required to call upon the Respondent ILA Local 1762 to refer employees or applicants for employment as stevedores or other workers which it may need to unload ships at its dock located in the port of Guanica. Said agreement further provides that the Respondent Company could hire employees for said work from other sources only in the event that the Respondent ILA Local 1762 fails to furnish said workers one hour before the unloading operations are scheduled to begin.

[fol. 10]

IX

The exclusive hiring or referral arrangement described above in paragraph VIII fails to incorporate, and the Respondents have failed to put into effect, any standards or criteria for the selection and referral of employees or applicants for employment by the Respondent ILA Local 1762. Said agreement also does not contain explicit provisions requiring the Respondent ILA Local 1762 to make the selections and referrals of employees on a non-discriminatory basis without regard to the membership or

non-membership of the employees or applicants for employment in said union. It also does not contain a reservation on the part of the Respondent Company which would enable it to reject any employee or applicant for employment referred to it by said union. It also fails to contain a provision for the posting of the terms and conditions of said referral arrangement at a place or places where employees or applicants for employment would have notice thereof.

X

At all times since the execution of the contract of July 19, 1951 and of the Stipulation Agreement of Sept. 5, 1955 extending the same, the Respondent Company and the Respondents ILA Council and its Local 1762 at the port of Guanica have maintained in effect and enforced the closed shop and exclusive hiring referral arrangements referred to above in paragraphs VII and VIII.

XI

The contract of July 19, 1951, as extended by the Stipulation Agreement of Sept. 5, 1955 mentioned above in paragraph VI, also contains a provision whereby the Respondent Company agrees, upon proper authorization from its employees, to check off or deduct the sum of ten (10) cents from the salary of each said employee for every shift of work performed by him and to turn said moneys over to the Respondent ILA Council.

[fol. 11]

XII

At all times since the execution of the contract of July 19, 1951 and of the Stipulation Agreement of Sept. 5, 1955 extending the same, the check-off arrangement referred to above in paragraph XI has been maintained in effect and applied by the parties thereto to all stevedores and related workers who have worked at the Respondent Company's dock at the port of Guanica.

XIII

At all times since the execution of the contract of July 19, 1951 and of the Stipulation Agreement of Sept. 5, 1955

extending the same, the Respondent Company and Respondents ILA Council and its Local 1762 have required all employees and applicants for employment at the Respondent Company's dock at the port of Guanica, to become and remain members of Respondent ILA Local 1762 and to pay an initiation fee and monthly dues to said Respondent ILA Local 1762 and the work shift fee to Respondent ILA Council as conditions of employment, in accordance with the closed shop agreement referred to above in paragraph VII.

XIV

By the acts and each of them described above in paragraphs VII, VIII, IX, X, XI, XII and XIII, the Respondent Company has interfered with, restrained and coerced, and is interfering with, restraining and coercing employees in the exercise of the rights guaranteed by the Act and by said acts and each of them it has discriminated and is discriminating against employees in regard to their hire, tenure, terms and conditions of employment to encourage membership in a labor organization, and by said acts it has rendered and is rendering financial and other assistance and support to a labor organization, and thereby it violated and is violating Sections 8 (a) (1), (2) and (3) of the Act.

[fol. 12]

XV

By the acts and each of them described above in paragraphs VII, VIII, IX, X, XI, XII and XIII, Respondents ILA Council and its Local 1762 restrained and coerced, and are restraining and coercing employees in the exercise of the rights guaranteed by the Act, and by said acts and each of them they caused or attempted to cause, and are causing or attempting to cause an employer to discriminate against employees in regard to their hire, tenure, terms and conditions of employment to encourage membership in a labor organization, and thereby they violated and are violating Sections 8 (b) 1 (A) and (2) of the Act.

XVI

The acts and conduct of all Respondents herein as set forth in paragraphs VII through XIII, occurring in connection with the operations of Respondent Company described in paragraph II above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and territories of the United States and the Commonwealth of Puerto Rico, and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (2) and (3), and Section 8 (b) (1) (A) and (2) of the Act, and Section 2 (6) and (7) of the Act.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 7th day of April, 1959, at the Fifth Floor, Banco Credito y Ahorro Bldg., Stop 17, Ponce de Leon Ave., Santurce, P.R., at 10:00 a.m., a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Consolidated Complaint, at which time and place you will have the right to appear [fol. 13] in person, or otherwise, and give testimony.

You are further notified that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, you are required to file with the Regional Director within ten (10) days after service of the annexed complaint upon you, an original and four (4) copies of an answer which specifically admits, denies or explains each of the facts alleged in said complaint, unless you are without knowledge, in which case you shall so state. Unless such answer is filed within the time required, all the allegations of said complaint shall be deemed to be admitted to be true and may be so found by the Board unless good cause to the contrary is shown.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-Fourth Region, on this 26th day of February, 1959, hereby issues this Order Consolidating Cases, Consolidated Complaint and Notice of Hearing

against Ochoa Fertilizer Corporation and International Longshoremen's Association, District Council of the Ports of P.R., ILA Ind., and International Longshoremen's Assoc. Local 1762, DCPPR, ILA-Ind., (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900), the Respondents herein.

/s/ Raymond J. Compton
RAYMOND J. COMPTON
Regional Director

[fol. 14] BEFORE THE
NATIONAL LABOR RELATIONS BOARD
24TH REGION

Case No. 24-CA-1038

OCHOA FERTILIZER CORPORATION

and

JUAN PADILLA

and

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-IND., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762, DCPPR, ILA-IND., (also known as UNION DE ESTIBADORES DE GUANICA, IBL-SUB LOCAL 1900)

Parties to the Contract

Case No. 24-CB-271

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-IND., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762, DCPPR, ILA-IND., (also known as UNION DE ESTIBADORES DE GUANICA, SUB-LOCAL 1900)

and

JUAN PADILLA

and

OCHOA FERTILIZER CORPORATION

Party to the Contract

STIPULATION—January 29, 1960

It is hereby stipulated and agreed by and between Hernan R. Franco, Attorney for Respondent Company, Ochoa Fertilizer Corporation (hereinafter referred to as Respondent Ochoa); Jose Aulet, Attorney for International Longshoremen's Association, District Council of the Ports of Puerto Rico, ILA-Ind., and International Long-

shoremen's Association, Local 1762, DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900), (hereinafter individually referred to as Respondent ILA Council and Respondent ILA Local 1762 respectively, and collectively referred to as Respondent Unions), Juan Padilla Torres, the charging party herein, and General Counsel of the National Labor Relations Board, 24th Region, that:

[fol. 15] I

Upon a charge filed on June 26, 1958 and an amended charge filed on November 26, 1958 by Juan Padilla against Respondent Ochoa in Case No. 24-CA-1038 alleging violations of Sections 8 (a) (1), (2) and (3) of the Act, receipt of which charges is hereby acknowledged by the Respondent Ochoa; and upon a charge filed on June 26, 1958 and an amended charge filed on November 26, 1958 by Juan Padilla against Respondents ILA Council and ILA Local 1762 in Case No. 24-CB-271 alleging violations of Sections 8 (b) (1) (A) and (2) of the Act, receipt of which charges is hereby acknowledged by Respondents ILA Council and ILA Local 1762, the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (hereinafter called the Board) by the Regional Director for the 24th Region, acting pursuant to authority granted in Section 10 (b) of the National Labor Relations Act, 61 Stat. 136 (herein called the Act) and pursuant to Section 102.15 of the Board's Rules and Regulations, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing dated February 26, 1959 against said Respondent Ochoa and Respondents ILA Council and ILA Local 1762. True copies of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing were duly served by registered mail upon the Respondent Ochoa and Respondents ILA Council and ILA Local 1762, in accordance with the Board's Rules and Regulations, Series 8.

II

Respondent Ochoa is a corporation of the Commonwealth of Puerto Rico with its principal place of business

and plant located at Hato Rey, Puerto Rico, where it is engaged in the manufacture of chemical fertilizers. In connection with its business operations, it also maintains a fertilizer manufacturing plant, warehouse and dock facilities at the Port of Guanica, Puerto Rico. At its dock [fol. 16] at Guanica, Puerto Rico it receives and unloads ships which bring materials necessary for its manufacturing operations. During the year 1958, it imported into the Commonwealth of Puerto Rico chemicals and other materials which were valued at in excess of $4,000,000.00. During the same period, it exported from said Commonwealth fertilizers and other products valued at in excess of $100,000.00. Its annual volume of business is in excess of $8,000,000.00.

III

Respondent Ochoa is, and at all times material herein has been, engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

IV

Respondent ILA Council and Respondent ILA Local 1762 are each labor organizations within the meaning of Section 2, subsection (5) of the Act.

V

All parties hereto expressly waive a hearing, an Intermediate Report of a Trial Examiner, the filing of exceptions to such Intermediate Report, oral arguments before the Board, and all further and other proceedings to which Respondent Ochoa and the Respondents ILA Council and ILA Local 1762 may be entitled to under the Act or the Rules and Regulations of the Board. Respondent Ochoa hereby withdraws the Answer filed by it in Case 24-CA-1038 on March 17, 1959. Respondents ILA Council and ILA Local 1762 hereby withdraw the joint Answer filed by them in Case 24-CA-271 on March 16, 1959.

VI

This stipulation together with the charges and amended charges, Affidavits of Service of said charges and amended charges, Order Consolidating Cases, Consolidated Complaint and Notice of Hearing and Affidavit of Service of [fol. 17] said Order Consolidating Cases Consolidated Complaint and Notice of Hearing, shall constitute the entire record herein and shall be filed with the Board.

VII

Upon this Stipulation and the record herein, as set forth in paragraph VI above, and without any further notice of proceedings herein, the Board may enter an Order forthwith providing as follows:

ORDER

Upon the entire record herein and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Ochoa Fertilizer Corporation, its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Performing, maintaining, or otherwise giving effect to any agreement, arrangement, practice or understanding with ILA Council and/or ILA Local 1762, or any other labor organization which in an unlawful manner, conditions employment or the retention of employment upon clearance or approval by the aforementioned labor organziations, or by any other labor organization.

(b) Performing, maintaining, or otherwise giving effect to any agreement, arrangement, practice, or understanding with ILA Council and/or ILA Local 1762, or any other labor organization which conditions employment or the retention of employment upon membership in the aforementioned labor organizations or any other labor organization, except as authorized by the proviso to Section 8 (a) (3) of the Act.

(c) Performing, maintaining, or giving effect to the unlawful union security provisions of its collective bargain-

ing agreement of July 19, 1951, as extended by the Stipulation Agreement of September 5, 1955 with ILA Council, or [fol. 18] entering into or enforcing any extension, renewal, modification or supplement thereof, or any superseding agreement with these unions containing union security provisions, except to the extent authorized by Section 8 (a) (3) of the Act.

(d) Encouraging membership in ILA Council and/or ILA Local 1762, or any other labor organization by discriminating in respect to the hire or tenure of employment or any terms or conditions of employment of its employees, including applicants for employment, except to the extent authorized in Section 8 (a) (3) of the Act.

(e) Recognizing the above-named labor organizations, or any successors thereto, as the representatives of the stevedores and related workers it employs at its dock operations located at the port of Guanica for the purpose of negotiating concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among said stevedores and related workers employed by the Respondent Company at its dock operations located at the port of Guanica.

(f) Performing, maintaining, or otherwise giving effect to any agreement, arrangement, practice, or understanding with the above-named labor organizations, or any successors thereto, unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the stevedores and related workers employed by the Respondent Company at its dock operations located at the port of Quanica.

[fol. 19] In like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be validly affected by an agreement, entered into in accordance with Section 8 (a) (3) of the Act, requiring membership in a labor organization as a condition of employment as authorized by said

section, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from the above-named labor organizations, or any successors thereto, as representatives of the stevedores and related workers it employs at its dock operations located at the port of Guanica for the purpose of negotiating concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment unless and until said labor organization, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among said stevedores and related workers employed by the Respondent Company at its dock operations located at the port of Guanica.

(b) Jointly and severally with Respondent Unions reimburse all of its present and former employees for any initiation fees, dues, assessments, or any other monies paid pursuant to its unlawful union security and/or hiring arrangements with Respondent Unions, provided, however, that this Order shall not be construed as requiring reimbursement for any such monies paid more than six months prior to the date of the original charges herein.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all [fol. 20] records, reports, and other documents necessary to analyze the amounts of monies due under the terms of this Order.

(d) Post in English and in Spanish at its business offices, copies of the Notice attached hereto as "Appendix A". Copies of said notice to be furnished by the Regional Director for the 24th Region shall, after being duly signed by an authorized representative of Respondent Ochoa, be posted by Respondent Ochoa immediately upon the receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Ochoa to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for the 24th Region in writing within ten (10) days from the date of this Order of the steps taken to comply herewith.

B. Respondents International Longshoremen's Association, District Council of the Ports of Puerto Rico, ILA-Ind., and International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900), their officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Performing, maintaining, or otherwise giving effect to any employment agreement, arrangement, practice or understanding with Ochoa Fertilizer Corporation, or any other employer, over which the Board will assert jurisdiction which, in an unlawful manner conditions employment or the retention of employment upon clearance or approval by ILA Council and/or ILA Local 1762 or any other labor organization.

(b) Performing, maintaining, or otherwise giving effect to any agreement, arrangement, practice or understanding [fol. 21] with Ochoa Fertilizer Corporation, or with any other employer, over which the Board will assert jurisdiction, which conditions employment or the retention of employment upon membership in ILA Council and/or ILA Local 1762 or any other labor organization except to the extent authorized by the proviso to Section 8 (a) (3) of the Act.

(c) Performing, maintaining, or giving effect to the unlawful union security provisions of its collective bargaining agreement of July 19, 1951, as extended by the stipulation agreement of September 5, 1955 with Ochoa Fertilizer Corporation, or entering into or enforcing any extension, renewal, modification or supplement thereof or any superseding agreement with this company containing union security provisions, except as authorized by the proviso to Section 8 (a) (3 of the Act.

(d) Causing or attempting to cause Ochoa Fertilizer Corporation or any other employer over which the Board will assert jurisdiction, to discharge or refuse to hire any

employee including any applicant for employment, or otherwise to discriminate against any employee in violation of Section 8 (a) (3) of the Act.

(e) In like or related manner, restraining or coercing employees in the exercise of the rights under Section 7 of the Act, except to the extent that such rights may be validly affected by an agreement entered into, in accordance with Section 8 (a) (3) of the Act, requiring membership in a labor organization as a condition of employment as authorized by said Section, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Respondent Ochoa reimburse all present and former employees of Respondent Ochoa for all initiation fees, dues, assessments, or any other monies paid pursuant to its unlawful union security [fol. 22] and/or hiring arrangements with Respondent Ochoa, provided, however, that this Order shall not be construed as requiring reimbursement for any such monies paid more than six months prior to the date of the original charges herein.

(b) Preserve and make available to the Board, or its agents, upon request, for examination and copying all records, reports and other documents necessary to analyze the amounts of monies due under the terms of this Order.

(c) Post in English and in Spanish, at its business offices and meeting halls, copies of the Notice attached hereto as Appendix "B". Copies of said notice to be furnished by the Regional Director for the 24th Region shall, after being duly signed by an authorized representative of Respondents ILA Council and ILA Local 1762, be posted by them immediately upon the receipt thereto and be maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to their members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced or covered by any other material.

(d) Mail to the Regional Director for the 24th Region signed copies of the notice attached hereto as Appendix

"B" for posting at the offices of Ochoa Fertilizer Corporation in places where notices to the Company's employees are customarily posted.

(e) Notify the Regional Director for the 24th Region in writing within ten (10) days from the date of this Order what steps it has taken to comply herewith.

[fol. 23]

VIII

It is further stipulated and agreed that any United States Court of Appeals for any appropriate circuit may on application by the Board, enter a decree enforcing the Order of the Board in the form set forth in Paragraph VII above. Respondents waive all defenses to the entry of the decree, including alleged compliance with the Order of the Board and their rights to receive notices of the filing of an application for an entry of said decree, provided that such decree is in the words and figures of the Order set forth in Paragraph VII above. However, Respondents are required to comply with the affirmative provisions of the Board Order after the entry of the decree only to the extent that they have not already done so.

IX

This Stipulation contains the entire agreement between the parties, there being no agreement or understanding of any kind, oral or otherwise, which varies, alters, or adds to this Stipulation.

X

This Stipulation is subject to the approval of the National Labor Relations Board and it is of no force and effect unless and until the Board has approved the same. Upon the Board's approval of this Stipulation, the Re-

[fol. 24] spondents will immediately comply with the provisions of the Order set forth in paragraph VII above.

Signed at Santurce, Puerto Rico, this 29 day of January, 1960.

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P. R. ILA-IND., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762 DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900)

By /s/ Jose Aulet, Attorney

OCHOA FERTILIZER CORPORATION

By /s/ Hernan R. Franco, Attorney

/s/ Juan Padilla Torres
Charging Party

Approval by the General Counsel recommended:

/s/ Luis D. Miranda
Attorney, 24th Region
National Labor Relations Board
Box 9176, Santurce, P.R.

Date Feb. 1/1960

Approved:

William T. Ashley
Office of the General Counsel
National Labor Relations Board
Washington 25, D.C.

Date Feb. 5 1960

[fol. 25] APPENDIX "A" TO STIPULATION

PROPOSED NOTICE TO ALL EMPLOYEES

OF

OCHOA FERTILIZER CORPORATION

PURSUANT TO

a Decision and Order of the National Labor Relations Board based upon a Stipulation providing for a consent decree in an appropriate circuit of the United States Court of Appeals, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise give effect to any agreement, arrangement, practice or understanding with International Longshoremen's Association, District Council of the Ports of P.R., ILA-Ind., and/or International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900) or any other labor organization which, in an unlawful manner, conditions employment or the retention of employment upon clearance or approval by the aforementioned labor organizations or by any other labor organization.

WE WILL NOT perform, maintain, or otherwise give effect to any agreement, arrangement, practice or understanding with the above-mentioned labor organizations, or any other labor organization which conditions employment or the retention of employment upon membership in the aforementioned labor organizations or any other labor organization, except as authorized by the proviso to Section 8 (a) (3) of the Act.

WE WILL NOT perform, maintain, or give effect to the unlawful union security provisions of the collective bargaining agreement of July 19, 1951, as extended by the Stipulation Agreement of September 5, 1955 with International Longshoremen's Association, Dis-

trict Council of the Ports of P.R. ILA-Ind. or enter into or enforce any extension, renewal, modification or supplement thereof, or any superseding agreement with these unions containing union security provisions, except to the extent authorized by Section 8 (a) (3) of the Act.

WE WILL NOT encourage membership in the above-mentioned labor organizations, or any other labor organization by discriminating in respect to the hire or tenure of employment or any terms or conditions of employment of its employees, including applicants for employment except to the extent authorized in Section 8 (a) (3) of the Act.

[fol. 26] WE WILL NOT recognize the above-named labor organizations, or any successors thereto, as the representatives of the stevedores and related workers we employ at our dock operations located at the port of Guanica for the purpose of negotiating, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among said stevedores and related workers we employ at said dock operations located at the port of Guanica.

WE WILL NOT perform, maintain, or otherwise give effect to any agreement, arrangement, practice, or understanding, with the above-named labor organizations, or any successors thereto, unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the stevedores and related workers employed by us at our dock operations located at the port of Guanica.

WE WILL NOT in any like or related manner, restrain or coerce employees in the exercise of the rights under Section 7 of the Act, except to the extent that such rights may be validly affected by an agreement

entered into, in accordance with Section 8 (a) (3) of the Act, requiring membership in a labor organization as a condition of employment as authorized by said section, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL withhold and withdraw all recognition from International Longshoremen's Association, District Council of the Ports of P.R. ILA-Ind., and International Longshoremen's Association, Local 1762, DC-PPR, ILA-Ind., or any successors thereto, as representatives of the stevedores and related workers we employ at our dock operations located at the port of Guanica for the purpose of negotiating concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among said stevedores and related workers we employ at our dock operations located at the port of Guanica.

WE WILL jointly and severally with the International Longshoremen's Association, District Council of the Ports of P.R., ILA-Ind. and International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900) reimburse all of our present and former [fol. 27] employees for any initiation fees, dues, assessments, or any other monies paid pursuant to our unlawful union security and/or hiring arrangements with the aforementioned labor organizations, provided, however, that this obligation shall not be construed as requiring reimbursement for any such monies paid prior to December 26, 1957.

OCHOA FERTILIZER CORPORATION

Date: ..... By .....

This notice must remain posted for sixty (60) consecutive days from the date hereof and must not be altered, defaced or covered with any other material.

[fol. 28] APPENDIX "B" TO STIPULATION

PROPOSED NOTICE TO ALL MEMBERS

OF

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-IND

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762 DCPPR, ILA-IND. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900)

PURSUANT TO

a Decision and Order of the National Labor Relations Board based upon a Stipulation providing for a consent decree in an appropirate circuit of the United States Court of Appeals, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise give effect to any employment agreement, arrangement, practice or understanding with Ochoa Fertilizer Corporation, or any other employer, over which the National Labor Relations Board will assert jurisdiction which, in an unlawful manner, conditions employment or the retention of employment upon clearance or approval by us, or any other labor organization.

WE WILL NOT perform, maintain, or otherwise give effect to any agreement, arrangement, practice or understanding with Ochoa Fertilizer Corporation or with any other employer, over which the National Labor Relations Board will assert jurisdiction, which conditions employment or the retention of employment upon membership in our organizations, or any other labor organization except to the extent authorized by the proviso to Section 8 (a) (3) of the Act.

WE WILL NOT perform, maintain, or give effect to the unlawful union security provisions of the collective bargaining agreement of July 19, 1951 as extended by the Stipulation Agreement of September 5, 1955, with Ochoa Fertilizer Corporation, or enter into or enforce any extension, renewal, modification or supplement thereof or any superseding agreement with Ochoa Fertilizer Corporation containing union security provisions, except as authorized by the proviso to Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause Ochoa Fertilizer Corporation or any other employer over which the National Labor Relations Board will assert jurisdiction, to discharge or refuse to hire any employee, including any applicant for employment, or otherwise to discriminate against any employee in violation of Section 8 (a) (3) of the Act.

[fol. 29] WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be validly affected by an agreement, entered into in accordance with Section 8 (a) (3) of the Act, requiring membership in a labor organization as a condition of employment as authorized by said section, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL jointly and severally with Ochoa Fertilizer Corporation reimburse all present and former employees of Ochoa Fertilizer Corporation for all initiation fees, dues, assessments, or any other monies paid pursuant to our unlawful union security and/or hiring arrangements with Ochoa Fertilizer Corporation, provided, however, that this obligation shall not be con-

strued as requiring reimbursement for any such monies paid prior to December 26, 1957.

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-Ind., and INTERNATIONAL LONGSHOREMEN'S ASSOC. LOCAL 1762, DCPPR, ILA-IND. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900)

Date: ..... By .....

This notice must remain posted for sixty (60) consecutive days from the date hereof and must not be altered, defaced or covered with any other material.

[fol. 30] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 24-CA-1038

OCHOA FERTILIZER CORPORATION

and

JUAN PADILLA TORRES

and

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-IND., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762, DCPPR, ILA-IND., (also known as UNION DE ESTIBADORES DE GUANICA, IBL-SUB LOCAL 1900)

Parties to the Contract

Case No. 24-CB-271

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-IND., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762 DCPPR, ILA-IND. (also known as UNION DE ESTIBADORES DE GUANICA, SUB-LOCAL 1900)

and

JUAN PADILLA TORRES

and

OCHOA FERTILIZER CORPORATION

Party to the Contract

DECISION AND ORDER—March 16, 1960

Statement of the Cases

On February 1, 1960, Ochoa Fertilizer Corporation, herein called Respondent Ochoa; International Longshoremen's Association, District Council of the Ports of Puerto

Rico, ILA-Ind., and International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL Sub-local 1900), herein called individually Respondent ILA Council and Respondent ILA Local 1762 respectively and collectively called Respondent Unions; Juan Padilla Torres, the Charging Party herein; and the General Counsel of the National Labor Relations Board, herein called the Board, entered into a Stipulation, in settlement of the cases, subject to approval of the Board, providing for the entry of a consent order by the Board, and a consent decree by any appropriate United States Court of Appeals. The parties waived all further and other procedure before the Board to which the Respondents may be entitled under the Act, and the Rules and Regulations of the Board, and Respondents waived their right to contest the entry of a consent decree or to receive further notice of the application therefor.

The aforesaid Stipulation is hereby approved and made a part of the record herein, and the proceeding is hereby transferred to and continued before the Board for the entry of a Decision and Order pursuant to the provisions of the said Stipulation.

[fol. 31] Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this proceeding to a three-member panel.

Upon the basis of the aforesaid Stipulation and the entire record in the cases, the Board makes the following:

Findings of Fact

1. The business of Respondent Ochoa

Ochoa Fertilizer Corporation, a Puerto Rico corporation with its principal place of business and plant located at Hato Rey, Puerto Rico, is engaged in the manufacture of chemical fertilizer. In connection with its business operations it also maintains a fertilizer manufacturing plant, warehouse and dock facilities at the Port of Guanica, Puerto Rico. At its dock at Guanica, Puerto Rico, it receives and unloads ships which bring materials necessary for its manufacturing operations. During the year 1958,

it imported into the Commonwealth of Puerto Rico chemicals and other materials which were valued at in excess of $4,000,000.00 During the same period, it exported from the said Commonwealth fertilizers and other products valued at in excess of $100,000.00. Its annual volume of business is in excess of $8,000,000.00. Ochoa Fertilizer admits, and we find, that it is engaged in commerce within the meaning of the Act.

2. The labor organizations involved

International Longshoremen's Association, District Council of the Ports of Puerto Rico, ILA-Ind., and International Longshoremen's Association Local 1762, DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL, Sub-local 1900) are labor organizations within the meaning of Section 2 (5) of the Act.

ORDER

Upon the basis of the above findings of fact, the Stipulation and the entire record in the cases, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

A. Respondent Ochoa Fertilizer Corporation, its officers, representatives, agents, successors and assigns shall:

1. Cease and desist from:

(a) Performing, maintaining, or otherwise giving effect to any agreement, arrangement, practice or understanding with ILA Council and/or ILA Local 1762, or any other labor organization which in an unlawful manner, conditions employment or the retention of employment upon clearance or approval by the aforementioned labor organizations, or by any other labor organization.

(b) Performing, maintaining, or otherwise giving effect to any agreement, arrangement, practice, or understanding with ILA Council, and/or ILA Local 1762, or any other labor organization which conditions employment or the retention of employment upon membership in the aforementioned labor organizations, or any other labor organization, except as authorized by the proviso to Section 8 (a)(3) of the Act.

[fol. 32] (c) Performing, maintaining, or giving effect to the unlawful union security provisions of its collective bargaining agreement of July 19, 1951, as extended by the Stipulation Agreement of September 5, 1955 with ILA Council, or entering into or enforcing any extension, renewal, modification or supplement thereof, or any superseding agreement with these unions containing union security provisions, except to the extent authorized by Section 8 (a)(3) of the Act.

(d) Encouraging membership in ILA Council and/or ILA Local 1762, or any other labor organization by discriminating in respect to the hire or tenure of employment or any terms or conditions of employment of its employees, including applicants for employment, except to the extent authorized in Section 8 (a)(3) of the Act.

(e) Recognizing the above-named labor organizations, or any successors thereto, as the representatives of the stevedores and related workers it employs at its dock operations located at the port of Guanica for the purpose of negotiating concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among said stevedores and related workers employed by the Respondent Company at its dock operations located at the port of Guanica.

(f) Performing, maintaining, or otherwise giving effect to any agreement, arrangement, practice, or understanding with the above-named labor organizations, or any successors thereto, unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the stevedores and related workers employed by the Respondent Company at its dock operations located at the port of Guanica.

(g) In like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be validly affected by an

agreement, entered into in accordance with Section 8 (a)(3) of the Act, requiring membership in a labor organization as a condition of employment as authorized by said section, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from the above-named labor organizations, or any successors thereto, as representatives of the stevedores and related workers it employs at its dock operations located at the port of Guanica for the purpose of negotiating concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among said stevedores and related workers employed by the Respondent Company at its dock operations located at the port of Guanica.

[fol. 33] (b) Jointly and severally with Respondent Unions reimburse all of its present and former employees for any initiation fees, dues, assessments, or any other monies paid pursuant to its unlawful union security and/or hiring arrangements with Respondent Unions, provided, however, that this Order shall not be construed as requiring reimbursement for any such monies paid more than six months prior to the date of the original charges herein.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all records, reports and other documents necessary to analyze the amounts of monies due under the terms of this Order.

(d) Post in English and in Spanish at its business offices, copies of the Notice attached hereto as "Appendix A". Copies of said notice to be furnished by the Regional Director for the 24th Region shall, after being duly signed by an authorized representative of Respondent Ochoa, be posted by Respondent Ochoa immediately upon the re-

ceipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Ochoa to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for the 24th Region in writing within ten (10) days from the date of this Order of the steps taken to comply herewith.

B. Respondents International Longshoremen's Association, District Council of the Ports of Puerto Rico, ILA-Ind., and International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind. (Also known as Union de Estibadores de Guanica, IBL Sub-Local 1900), their officers, representatives, agents, successors and assigns shall:

1. Cease and desist from:

(a) Performing, maintaining, or otherwise giving effect to any employment agreement, arrangement, practice or understanding with Ochoa Fertilizer Corporation, or any other employer, over which the Board will assert jurisdiction which, in an unlawful manner conditions employment or the retention of employment upon clearance or approval by ILA Council and/or ILA Local 1762 or any other labor organization.

(b) Performing, maintaining, or otherwise giving effect to any agreement, arrangement, practice or understanding with Ochoa Fertilizer Corporation, or with any other employer, over which the Board will assert jurisdiction which conditions employment or the retention of employment upon membership in ILA Council and/or ILA Local 1762 or any other labor organization except to the extent authorized by the proviso to Section 8 (a)(3) of the Act.

(c) Performing, maintaining, or giving effect to the unlawful union security provisions of its collective bargaining agreement of July 19, 1951, as extended by the stipulation agreement of September 5, 1955 with Ochoa Fertilizer Corporation, or entering into or enforcing any extension, renewal, modification or supplement thereof or any superseding agreement with this company containing union security provisions, except as authorized by the proviso to Section 8 (a)(3) of the Act.

[fol. 34] (d) Causing or attempting to cause Ochoa Fertilizer Corporation or any other employer over which the Board will assert jurisdiction, to discharge or refuse to hire any employee including any applicant for employment, or otherwise to discriminate against any employee in violation of Section 8 (a)(3) of the Act.

(e) In like or related manner, restraining or coercing employees in the exercise of the rights under Section 7 of the Act, except to the extent that such rights may be validly affected by an agreement entered into, in accordance with Section 8 (a)(3) of the Act, requiring membership in a labor organization as a condition of employment as authorized by said Section, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Respondent Ochoa reimburse all present and former employees of Respondent Ochoa for all initiation fees, dues, assessments, or any other monies paid pursuant to its unlawful union security and/or hiring arrangements with Respondent Ochoa, provided, however, that this Order shall not be construed as requiring reimbursement for any such monies paid more than six months prior to the date of the original charges herein.

(b) Preserve and make available to the Board, or its agents, upon request, for examination and copying all records, reports and other documents necessary to analyze the amounts of monies due under the terms of this Order.

(c) Post in English and in Spanish, at its business offices and meeting halls, copies of the Notice attached hereto as Appendix "B". Copies of said notice to be furnished by the Regional Director for the 24th Region shall, after being duly signed by an authorized representative of Respondents ILA Council and ILA Local 1762, be posted by them immediately upon the receipt thereto and be maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places

where notices to their members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced or covered by any other material.

(d) Mail to the Regional Director for the 24th Region signed copies of the notice attached hereto as Appendix "B" for posting at the offices of Ochoa Fertilizer Corporation in places where notices to the Company's employees are customarily posted.

(e) Notify the Regional Director for the Twenty-fourth Region, in writing, with ten (10) days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated, Washington, D. C. Mar 16 1960

Boyd Leedom, Chairman
Stephen S. Bean, Member
John H. Fanning Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[fol. 35] APPENDIX "A" TO DECISION AND ORDER

NOTICE TO ALL EMPLOYEES

OF

OCHOA FERTILIZER CORPORATION

PURSUANT TO

a Decision and Order of the National Labor Relations Board based upon a Stipulation providing for a consent decree in an appropriate circuit of the United States Court of Appeals, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise give effect to any agreement, arrangement, practice or understanding with International Longshoremen's Association, District Council of the Ports of P.R., ILA-Ind., and/or International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900) or any other labor organization which, in an unlawful manner, conditions employment or the retention of employment upon clearance or approval by the aforementioned labor organization or by any other labor organization.

WE WILL NOT perform, maintain, or otherwise give effect to any agreement, arrangement, practice or understanding with the above-mentioned labor organizations, or any other labor organization which conditions employment or the retention of employment upon membership in the aforementioned labor organizations or any other labor organization, except as authorized by the proviso to Section 8 (a)(3) of the Act.

WE WILL NOT perform, maintain, or give effect to the unlawful union security provisions of the collective bargaining agreement of July 19, 1951, as extended by the Stipulation Agreement of September 5, 1955

with International Longshoremen's Association, District Council of the Ports of P.R. ILA-Ind. or enter into or enforce any extension, renewal, modification or supplement thereof, or any superseding agreement with these unions containing union security provisions, except to the extent authorized by Section 8 (a)(3) of the Act.

WE WILL NOT encourage membership in the above-mentioned labor organizations, or any other labor organization by discriminating in respect to the hire or tenure of employment or any terms or conditions of employment of its employees, including applicants for employment except to the extent authorized in Section 8 (a)(3) of the Act.

WE WILL NOT recognize the above-named labor organizations, or any successors thereto, as the representatives of the stevedores and related workers we employ at our dock operations located at the port of Guanica for the purpose of negotiating concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among said stevedores and related workers we employ at said dock operations located at the port of Guanica.

[fol. 36] WE WILL NOT perform, maintain, or otherwise give effect to any agreement, arrangement, practice, or understanding, with the above-named labor organizations, or any successors thereto, unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the stevedores and related workers employed by us at our dock operations located at the port of Guanica.

WE WILL NOT in any like or related manner, restrain or coerce employees in the exercise of the rights under Section 7 of the Act, except to the extent

that such rights may be validly affected by an agreement entered into, in accordance with Section 8 (a) (3) of the Act, requiring membership in a labor organization as a condition of employment as authorized by said section, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL withhold and withdraw all recognition from International Longshoremen's Association, District Council of the Ports of P.R. ILA-Ind., and International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind., or any successors thereto, as representatives of the stevedores and related workers we employ at our dock operations located at the port of Guanica for the purpose of negotiating concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment unless and until said labor organizations, or any successors thereto, shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among said stevedores and related workers we employ at our dock operations located at the port of Guanica.

WE WILL jointly and severally with the International Longshoremen's Association, District Council of the Ports of P.R., ILA-Ind. and International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900) reimburse all of our present and former employees for any initiation fees, dues, assessments, or any other monies paid pursuant to our unlawful union security and/or hiring arrangements with the aforementioned labor organizations, provided, however, that this obligation shall not be construed as requiring reimbursement for any such monies paid prior to December 26, 1957.

OCHOA FERTILIZER CORPORATION

Date By

This notice must remain posted for sixty (60) consecutive days from the date hereof and must not be altered, defaced or covered with any other material.

[fol. 37] APPENDIX "B" TO DECISION AND ORDER

NOTICE TO ALL MEMBERS

OF

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
DISTRICT COUNCIL OF THE PORTS OF P. R., ILA-IND

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762 DCPPR, ILA-IND. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900)

PURSUANT TO

a Decision and Order of the National Labor Relations Board based upon a Stipulation providing for a consent decree in an appropriate circuit of the United States Court of Appeals, and an order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT perform, maintain, or otherwise give effect to any employment agreement, arrangement, practice or understanding with Ochoa Fertilizer Corporation, or any other employer, over which the National Labor Relations Board will assert jurisdiction which, in an unlawful manner, conditions employment or the retention of employment upon clearance or approval by us, or any other labor organization.

WE WILL NOT perform, maintain, or otherwise give effect to any agreement, arrangement, practice or understanding with Ochoa Fertilizer Corporation or with any other employer, over which the National Labor Relations Board will assert jurisdiction, which conditions employment or the retention of employment upon membership in our organizations, or any other labor organization except to the extent authorized by the proviso to Section 8 (a)(3) of the Act.

WE WILL NOT perform, maintain, or give effect to the unlawful union security provisions of the collective bargaining agreement of July 19, 1951 as extended by the Stipulation Agreement of September 5, 1955, with Ochoa Fertilizer Corporation, or enter

into or enforce any extension, renewal, modification or supplement thereof or any superseding agreement with Ochoa Fertilizer Corporation containing union security provisions, except as authorized by the proviso to Section 8 (a)(3) of the Act.

WE WILL NOT cause or attempt to cause Ochoa Fertilizer Corporation or any other employer over which the National Labor Relations Board will assert jurisdiction, to discharge or refuse to hire any employee, including any applicant for employment, or otherwise to discriminate against any employee in violation of Section 8 (a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be validly affected by an agreement, entered into in accordance with Section 8 (a)(3) of the Act, requiring membership in a labor organization as a condition of employment as authorized by said section, as modified by the Labor Management Reporting and Disclosure Act of 1959.

[fol. 38] WE WILL jointly and severally with Ochoa Fertilizer Corporation reimburse all present and former employees of Ochoa Fertilizer Corporation for all initiation fees, dues, assessments, or any other monies paid pursuant to our unlawful union security and/or hiring arrangements with Ochoa Fertilizer Corporation, provided, however, that this obligation shall not be construed as requiring reimbursement for any such monies paid prior to December 26, 1957.

INTERNATIONAL LONGSHOREMEN'S ASSOC. DISTRICT COUNCIL OF THE PORTS OF P.R., ILA-Ind., and
INTERNATIONAL LONGSHOREMEN'S ASSOC. LOCAL 1762, DCPPR, ILA-IND. (also known as Union de Estibadores de Guanica, IBL Sub-Local 1900)

Date By

This notice must remain posted for sixty (60) consecutive days from the date hereof and must not be altered, defaced or covered with any other material.

[fol. 39] IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

OCHOA FERTILIZER CORPORATION; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, DISTRICT COUNCIL OF THE PORTS OF PUERTO RICO, ILA-IND., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1762, DCPPR, ILA-IND. (Also known as UNION DE ESTIBADORES DE GUANICA, IBL SUB-LOCAL 1900), RESPONDENTS.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

UPON STIPULATION OF THE PARTIES FOR CONSENT DECREE—
Filed in Court of Appeals on June 15, 1960.

To the Honorable, the Judges of the United States Court of Appeals for the First Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order dated March 16, 1960. The proceeding resulting in said Order is known upon the records of the Board as Case Nos. 24-CA-1038 and 24-CB-271.

In support of this petition the Board respectfully shows:

(1) Respondent Ochoa Fertilizer Corporation (hereinafter called Respondent Ochoa) is engaged in business in Puerto Rico and Respondents International Longshoremen's Association, District Council of the Ports of Puerto Rico, ILA-Ind., and International Longshoremen's Association, Local 1762, DCPPR, ILA-Ind. (Also known as [fol. 40] Union de Estibadores de Guanica, IBL Sub-Local 1900), (hereinafter called individually Respondent ILA Council and Respondent ILA Local 1762 respectively and collectively called Respondent Unions) are a labor

organization engaged in promoting and protecting the interests of their members in Puerto Rico, all within this judicial circuit. This Court therefore has jurisdiction of this petition by Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on March 16, 1960, duly stated its findings of fact and issued an order directed to Respondents, their respective officers, representatives, agents, successors and assigns.

(3) Said Order was entered by the Board pursuant to a stipulation dated February 1, 1960, wherein Respondents agreed that the Board might enter an order, the form of which was set forth in the said stipulation. The order thereafter entered by the Board does not vary in any particular form that agreed to in the aforesaid stipulation. The stipulation further provided as follows:

> It is further stipulated and agreed that any United States Court of Appeals for any appropriate circuit may on application by the Board, enter a decree enforcing the Order of the Board in the form set forth . . . Respondents waive all defenses to the entry of the decree, including alleged compliance with the Order of the Board and their rights to receive notices of the filing of an application for an entry of said decree, provided that such decree is in the words and figures of the Order set forth . . . However, Respondents are required to comply with the affirmative provisions of the Board Order after the entry of the decree only to the extent that they have not already done so.

(4) On March 16, 1960, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, to Respondents' Counsel.

[fol. 41] (5) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court the record of the proceeding

before the Board including the pleadings, stipulation, findings of fact and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and record to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the stipulation referred to in paragraph (3) hereof, and the order made thereupon, a decree enforcing in whole said order of the Board and requiring Respondent Ochoa and Respondent Unions, their respective officers, representatives, agents, successors and assigns to comply therewith.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 14 day of June, 1960.

[fol. 42] IN THE
UNITED STATES COURT OF APPEALS

SUBMISSION—June 27, 1960

On June 27, 1960, this cause was submitted upon the petition of the National Labor Relations Board to Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan and Honorable Bailey Aldrich, Circuit Judges.

[fol. 43] IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

5698.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

OCHOA FERTILIZER CORPORATION, ET AL., RESPONDENTS.

DECREE.—July 8, 1960.

This cause was submitted on "Petition for Enforcement of an Order of the National Labor Relations Board upon Stipulation of the Parties for Consent Decree", and the record of proceedings before said Board.

Upon consideration whereof, It is ordered and decreed as follows: The order of the National Labor Relations Board of March 16, 1960, as modified herein, and with the exception of paragraphs A 2(e) and B 2(e), is hereby affirmed and enforced.

Paragraph A 1(a) of said order is modified by striking therefrom the words "or any other labor organization" and "or by any other labor organization".

Paragraph A 1(b) of said order is modified by striking therefrom the words "or any other labor organization" as they appeared twice therein.

Paragraph A 1(d) is modified by striking therefrom the words "or any other labor organization".

Paragraph B 1(a) of said order is modified by striking therefrom the words "or any other employer, over which the Board will assert jurisdiction".

Paragraph B 1(b) of said order is modified by striking therefrom the words "or with any other employer, over which the Board will assert jurisdiction,".

[fol. 44] Paragraph B 1(d) of said order is modified by striking therefrom the words "or any other employer over which the Board will assert jurisdiction,".

The first indented paragraph of the notice appended to said order as Appendix "A" is modified by striking there-

from the words "or any other labor organization" and "or by any other labor organization".

The second indented paragraph of the notice appended to said order as Appendix "A" is modified by striking therefrom the words "or any other labor organization" as they appeared twice therein.

The fourth indented paragraph of the notice appended to said order as Appendix "A" is modified by striking therefrom the words "or any other labor organization".

The first indented paragraph of the notice appended to said order as Appendix "B" is modified by striking therefrom the words "or any other employer, over which the National Labor Relations Board will assert jurisdiction" and "or any other labor organization".

The second indented paragraph of the notice appended to said order as Appendix "B" is modified by striking therefrom the words "or any other employer, over which the National Labor Relations Board will assert jurisdiction," and "or any other labor organization".

The fourth indented paragraph of the notice appended to said order as Appendix "B" is modified by striking therefrom the words "or any other employer over which the National Labor Relations Board will assert jurisdiction,".

It is further ordered that respondents herein notify the Regional Director for the Twenty-fourth Region in writing within thirty (30) days from the date of this Decree of the steps they have taken to comply with said order as herein modified, and affirmed and enforced.

By the Court:

/s/ Roger A. Stinchfield
Clerk.

Approved:

/s/ Peter Woodbury
Ch. J.

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[fol. 45] IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

(Title omitted)

MOTION FOR RECONSIDERATION—Filed July 28, 1960

The National Labor Relations Board for reasons set forth in the attached memorandum respectfully moves this Court for reconsideration of its order of July 8, 1960, and further moves the Court to enter a decree enforcing the Board's order as consented to.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Washington, D. C.,
July 26, 1960.

[fol. 46] IN THE
UNITED STATES COURT OF APPEALS

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ORDER OF COURT DENYING MOTION FOR RECONSIDERATION
August 3, 1960.

It is ordered that the Motion for Reconsideration filed herein by petitioner on July 25, 1960, be, and the same hereby is, denied.

By the Court:

ROGER A. STINCHFIELD, Clerk

By /s/ DANA H. GALLUP
Chief Deputy Clerk

Approved:

/s/ PETER WOODBURY
Ch. J.

• • • •

[fol. 47] UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5691

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

LAS VEGAS SAND & GRAVEL CORP.

No. 5698

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

OCHOA FERTILIZER CORP., ET AL., RESPONDENTS.

SECOND MOTION FOR RECONSIDERATION—Filed Aug. 8, 1960

On August 3, 1960, this Court denied motions for reconsideration in these cases. On the same date the Court of Appeals for the Second Circuit handed down a *per curiam* opinion, copies of which are attached, which supports the views set forth in our requests for reconsideration. We therefore respectfully request the Court to entertain this Second Request for Reconsideration in the light of the attached opinion of the Second Circuit, and upon such reconsideration to enter a decree enforcing the Board's order in full.

Respectfully submitted,

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

August 5, 1960.

[fol. 48] ATTACHMENT TO SECOND MOTION FOR RECONSIDERATION

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

COMBINED CENTURY THEATRES, INC., and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL NO. 640, ET AL., RESPONDENTS.

MOTION OF THE BOARD TO AMEND THE COURT'S DECISION AND CROSS-MOTION OF RESPONDENTS TO MODIFY THE ORIGINAL ORDER OF THE BOARD

Marcel Mallet-Prevost
Assistant General Counsel,
National Labor Relations Board,
Washington, D. C.

For Petitioner,

Cooper, Ostrin & DeVarco and
Zalkin & Cohen,
New York, N. Y.

For Respondents.

PER CURIAM:

Upon the motion of the General Counsel for the National Labor Relations Board, our decision of May 2, 1960 is amended so as to grant enforcement to the Board's order of March 11, 1959, as well as to the supplemental order of June 22, 1959, considered in our May 2, 1960 opnion.

Respondents' cross motion that the order of March 11, 1959 be granted enforcement only upon modification is denied. Respondents ask that the Board's order be narrowed in scope so as to exclude from its prohibitions un-

lawful conduct directed at employers and unions other than those as to which evidence of violations of the National Labor Relations Act was introduced. We need not consider the merits of respondents' contention that the [fol. 49] order is too broad in scope, for the order was entered by the Board pursuant to a stipulation between the General Counsel and the respondents; having so stipulated, respondents, of course, took no exception to the order before the Board nor, indeed, did they challenge its propriety upon the original argument before this Court. In the face of the stipulation, and in the absence of any exception to the order taken before the Board or the showing of any extraordinary circumstances, the Court will not consider respondents' objections. *N.L.R.B.* v. *District 50,* 355 U.S. 453, 464 (1958).

We do not understand the Supreme Court's recent decision in *Communications Workers* v. *N.L.R.B.,* 362 U.S. 479 (1960), upon which respondents rely, to express any jurisdictional limitation upon the Board's power, the excess of which we might consider even in the absence of proper exception, but rather to mean only that the evidence before the Board must be such as to justify not only the character but also the breadth of the Board's order. Questions as to the sufficiency of the evidence will, of course, be considered by the Court upon review of the order only if they have been appropriately preserved.

/s/ J. Edward Lumbard
U.S.C.J.

/s/ Stanley N. Barnes
U.S.C.J.

/s/ J. Joseph Smith
U.S.C.J.

August 3, 1960.

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[fol. 50] IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5698.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

OCHOA FERTILIZER CORPORATION ET AL., RESPONDENTS

On Second Motion for Reconsideration of a Decree.

No. 5691.

SAME *v.* LAS VEGAS SAND AND GRAVEL CORPORATION

On Second Motion for Reconsideration of a Decree.

No. 5590.

SAME *v.* LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO AND ITS BUSINESS AGENT, WILLIAM O'BRIEN

On Petition for Rehearing.

No. 5728.

SAME *v.* LEVITT CORPORATION; JOHN V. SULLIVAN AND KENSEAS CORPORATION

On Petition for Enforcement Upon Stipulation for Consent Decree.

No. 5729.

SAME *v.* ELCI PRODUCTS CORPORATION

On Petition for Enforcement Upon Stipulation for Consent Decree.

[fol. 51] No. 5736.

SAME *v.* UNION DE SOLDADORES, MECANICOS, MONTADORES DE ACERO, AUXILIARES Y RAMAS ANEXAS, LOCAL 1839 ILA-IND AND INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, DISTRICT COUNCIL OF THE PORTS OF PUERTO RICO, ILA-IND

On Petition for Summary Enforcement of an Order of the National Labor Relations Board.

No. 5740.

SAME *v.* INTERNATIONAL MOLDED PLASTICS OF PUERTO RICO, INC.

On Petition for Summary Enforcement of an Order of the National Labor Relations Board.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Dominick L. Manoli, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, on motions, petitions and memoranda, for National Labor Relations Board.

Appearance of *Sarah Torres Peralta* for Las Vegas Sand and Gravel Corporation.

Appearances of *Raymond E. Jordan, William A. Curran*, and *Sherwood & Clifford* for Local 476, etc.

George L. Weasler on the answer for International Molded Plastics of Puerto Rico, Inc.

OPINION OF THE COURT—October 18, 1960

ALDRICH, *Circuit Judge.* During the past two months we have accumulated for simultaneous disposition a number of motions by the Labor Board which, for one reason or [fol. 52] another, are uncontested.[1] We here consider (1) a second motion for reconsideration of a decree entered following stipulations by the parties in *NLRB* v. *Ochoa Fertilizer Corp.*, where we granted less relief than the respondents had agreed to; (2) the same in *NLRB* v. *Las Vegas Sand and Gravel Corp.*; (3) petition for rehearing filed in *NLRB* v. *Local 476, United Ass'n of Journeymen and Apprentices of the Plumbing Industry*, 1 Cir., 1960, 280 F.2d 441; (4) motion for decree following stipulation in *NLRB* v. *Levitt Corp.*; (5) the same in *NLRB* v. *Elci Products Corp.*; (6) petition for summary decree after hearing in *NLRB* v. *Union de Soldadores*; (7) the same in *NLRB* v. *International Molded Plastics of Puerto Rico, Inc.* The questions presented presented by the several motions are not identical, but they all involve the appropriate breadth of a Board order. In each of these cases the Board seeks an order which would enjoin respondent, or respondents, therein from engaging in some particular proscribed conduct not only with respect to the immediately involved party but with respect to "any other" party. We will characterize such orders as broad, although in some instances the Board asserts otherwise.[2]

In the *Ochoa Fertilizer* case it was charged that the respondent employer illegally maintained a closed or preferential shop agreement with the respondent union. The

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[1] In item 7, *infra*, the respondents have sought to file exceptions late. We are not satisfied from a review of the entire record that the Board erred in holding that respondents had presented an inadequate excuse for having failed to act with due expedition.

[2] No question is involved here, in spite of frequent references to the matter by the Board, of phrasing a decree with sufficient breadth to forestall "easy evasion." *McComb* v. *Jacksonville Paper Co.*, 1949, 336 U.S. 187, 193; *International Bhd. of Electrical Workers* v. *NLRB*, 1951, 341 U.S. 694, 705-6.

complaint filed by the Board alleged violation of sections 8(a)(1), (2) and (3), and 8(b)(1)(A) and (2) of the Na-
[fol. 53] tional Labor Relations Act. No hearing was held, but a stipulation was filed in which both respondents admitted the charges and agreed to the entry of a broad order. The employer was to be enjoined from agreeing with the respondent union, "or any other labor organization," with respect to unlawful discrimination in favor of its members, or person approved by it, with regard to hiring or conditions of employment. Similarly, the union was to be enjoined from making any unlawful preferential arrangements with Ochoa Fertilizer Corp., "or any other employer." Both respondents agreed that the appropriate Court of Appeals could enter decrees pursuant to the stipulation without notice, hearing or objection. After we had excised, *nostra sponte,* from the proposed form of decree all references to "any other labor organization" and "any other employer," the Board moved for reconsideration, and we denied the motion. It has now moved for further reconsideration.

In the *Las Vegas* case the situation is in all respects similar, except that the charges, based on alleged violations of sections 8(a)(1) and (3) of the act, were of various unlawful activities interfering with respondent's employees' joining Local 925 of the charging union. The Board's order, following a stipulation of the parties, forbade the employer to engage in such activities directed against "the union, or any other labor organization." We excised the phrase "or any other labor organization," and thereafter denied a motion for reconsideration. Again, the Board moves for further reconsideration.

In item (3), *NLRB* v. *Local 476, United Ass'n of Journeymen and Apprentices of the Plumbing Industry,* 1 Cir., 1960, 280 F.2d 441, a section 8(b)(4)(A) case, the respondent union was found to have induced a strike against Joseph P Cuddigan, Inc., the secondary employer, in order to assist its dispute with the E. Turgeon Construc-
[fol. 54] tion Company for whom Cuddigan was doing subcontracting work. The Board's proposed order forbade inducing the employees of Cuddigan "or of any other employer" to strike for the purpose of inducing Cuddigan "or any other employer or person" to cease doing business with Turgeon "or any other company." We struck the quoted phrases.

NLRB v. *Levitt Corp.*, item (4), is an action against three employers arising out of charges of discrimination by the local chapter of the United Brotherhood of Carpenters and Joiners. As in *Local 476* the charges made no reference to any other union. However, a complaint was filed asserting violations of sections 8(a)(1) and (3) by reason of unlawful activities discouraging membership in the union "or any other labor organization." The quoted phrase of the complaint was purely conclusory. Thereafter a stipulation was filed in which each employer consented to a decree enjoining activities directed against "the Carpenters Union or any other labor organization." No facts are adduced in this stipulation which go beyond the specific allegations of the charges, and there is no affirmative indication that any other labor organization may be involved, presently or prospectively.

(5) *NLRB* v. *Elci Products Corp.* is in all respects similar, in origin and in proposed disposition, to the *Levitt* case, except that the specific activities charged are even more restricted in extent, if not in character.

(6) In *NLRB* v. *Union de Soldadores*, a discharged employee filed charges against the local and its parent union, hereinafter called the District Council, asserting that he had lost employment because of the respondents' maintenance of an illegal preferential hiring agreement in violation of sections 8(b)(1)(A) and (2). The District Council was defaulted, and the local took no exceptions to the findings or recommendations of the trial examiner following the hearing. The examiner proposed that the [fol. 55] respondents be enjoined from enforcing any agreement with the particular employer, Abarca, Inc., whereby unlawful preference would be extended to their members. The Board enlarged this to read "Abarca, Inc., or any other employer over which the board will assert jurisdiction." The record does not reveal any special circumstances which could support this amplification.[3]

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[3] In a memorandum in support of this particular order the Board seeks to distinguish the *Ochoa Fertilizer* and *Las Vegas* cases on the ground that "in the instant case . . . the Board's *findings* support the order in the terms in which it was entered. The findings show, for example . . . ." (Ital. suppl.) The "examples" given are: (a) a statement that the charging party "testified" that he paid a fee to the District Council while previously working for some other

NLRB v. *International Molded Plastics of Puerto Rico, Inc.*, item (7), is a complaint alleging violation of sections 8(a)(1) and (3), in all respects similar to *Las Vegas*. However, in this instance we have a full report of the testimony and findings of the examiner, the case being one in which the Board moves for summary entry of a decree. Here, again, it is plain on the record that only the one union, and no generalized course of conduct, is involved.

In the aggregate this exhibits a marked fondness on the part of the Board for broad decrees. We might add to this list our recent cases of *NLRB* v. *Bangor Bldg. Trades Council*, 1 Cir., 1960, 278 F. 2d 287, and *NLRB* v. *Local 111, United Bhd. of Carpenters*, 1 Cir., 1960, 278 F. 2d [fol. 56] 823. In no case in which the record before us revealed the evidence available to the Board[4] was there any evidence of similar misconduct directed towards other employers, or other labor organizations. On this substantial showing we must at least suspect that the Board uses the broad form of decree as a matter of course. This suspicion is confirmed by the Board's memoranda presently before us. We do not approve of such a practice.

An order, when implemented by us, becomes an injunction. The Supreme Court emphasized this in excising overly broad portions of a Board order in *NLRB* v.

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employer; (b) a statement that, at the request of the District Council, he had been discharged by that other employer, which discharge is "the subject of another unfair labor practice proceeding . . . ." We have had occasion before to point out that a recitation of testimony is not a "finding." *NLRB* v. *Local 176, United Bhd. of Carpenters*, 1 Cir., 1960, 276 F.2d 583, 584. *A fortiori*, a statement that a matter is presently the subject of another proceeding is not a "finding." *Cf. NLRB* v. *Local 926, Int'l Union of Operating Eng'rs*, 5 Cir., 1959, 267 F.2d 418, 420. If by the use of the words "for example" counsel means to suggest that there are other special findings in the record which support his contention, we can only say that a careful search has failed to discover them Counsel should not place such a burden upon us.

[4] This includes *Local 111* because, although that case came up on a petition for summary enforcement, due to the respondent's having failed to file objections or exceptions, we had the findings of the examiner containing a detailed account of the evidence. It does not include the consent cases, with which we shall deal separately.

Express Publishing Co., 1941, 312 U. S. 426; see Note, 1944, 54 Yale L. J. 141—affirmative reasons must appear to warrant broad injunctions. *Express Publishing Co.* has recently reaffirmed in *Communications Workers* v. *NLRB*, 1960, 362 U. S. 479, a section 8(b)(1)(A) case, where the court held, virtually without discussion, that because there was no evidence of a "generalized scheme" a union's interference with the employees of one particular employer could not justify a decree against activity with relation to the employees "of any other employer." The Board, however, draws a very narrow lesson.[5] In *Las Vegas*, where there is no suggestion in the record of any other union's being in the picture, a request is made for a decree which would subject the employer to contempt proceedings [fol. 57] if it engaged in the prohibited conduct, not only with respect to the charging union, but as to "any other labor organization." The Board argues, "If respondent's employees should evince interest in another union . . . [they should] be protected if they exercise their statutory right to 'form, join, or assist' another union." "It is not unreasonable to infer that [the employer] would repeat his conduct if they tried to organize another." (This last contention was watered down in *Ochoa Fertilizer* to say it is not "unreasonable to infer that [the union] *may* engage in similar hiring practices with other [s]." (Ital. suppl.) These are the same unsubstantiated suppositions the court held to be insufficient. Again, in *Local 476*, where there was no evidence of any pattern or general course of conduct, the Board, without reference to this fact, openly states that its order was addressed broadly, "as in uniformly the case where the Board finds a violation of section 8(b)(4)(A)." See also *NLRB* v. *International Molded Plastics*, likewise tried on the merits.

We cannot avoid the conclusion that the Board finds it proper to take a single offense as establishing the "gen-

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[5] In *Soldadores* and *International Molded Plastics* it draws none at all. See *infra*. In connection with *Ochoa Fertilizer* it asserts that the *Communication Workers* case is not applicable since particular coercive conduct is distinguishable from an unlawful hiring arrangement, and that there is "more reason" to expect that the latter will be repeated. This "reason" is not clear to us, and in view of what we find to be the Board's general practice it seems in the nature of an afterthought.

eralized scheme" (*Communication Workers* v. *NLRB; supra*), "proclivity" (*McComb* v. *Jacksonville Paper Co., supra,* at 192), or "pattern" (*NLRB* v. *Brewery and Beer Distributor Drivers,* 3 Cir., 1960, F.2d), necessary to warrant wholesale relief. Its logic, in the face of the clear pronouncements of the Court, escapes us. In those cases in which the record makes it apparent that there was but a single party involved we will not grant it. *NLRB* v. *United Bhd. of Carpenters,* 7 Cir., 1960, 276 F.2d 694; *NLRB* v. *Local 926, Int'l Union of Operating Eng'rs,* 5 Cir., 1959, 267 F.2d 418, 420; *International Bhd. of Teamsters* v. *NLRB,* D.C. Cir., 1958, 262 F.2d 456, 462.

[fol. 58] We turn to the consent cases, in which no evidence is presented by the record. The Board contends that we have "no right" not to enter the decree that the parties have stipulated to. It cites *NLRB* v. *Cheney California Lumber Co.,* 1946, 327 U.S. 385, for the proposition that in the absence of timely objection by the respondent, this court must enforce any order propounded by the Board. In our opinion that case stands for no such proposition. The court there was careful to point out that findings of record disclosed a "course of conduct against which such an order may be the only proper remedy." *Id.* at 389. It was equally careful to point out that the situation would be different if the Board had "patently traveled outside the orbit of its authority." *Id.* at 388. We readily concur that we have no right to deny enforcement of an order warranted by the record. This concession does not advance the matter, however, for we equally have no right to enter one which is not warranted. The question is, what does the record warrant.

An injunction broader than the need is not only contrary to all established equitable principles, but it is peculiarly inappropriate in the sensitive area of labor relations where abuses formerly rampant under broadly and vaguely worded decrees are legendary. See, *e.g.,* Frankfurter and Greene, The Labor Injunction, Ch. III (1930). The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, put an end to these abuses in the federal courts, and the broad principle for which it stands has not been compromised by subsequent labor legislation. Nor should it be by any

"expertise" of the Board. We have seen that the Board's conclusion that "it is reasonable to infer" that a single offender will be an habitual one falls far short of the necessary showing. Nor does the willingness of a party, apprehended in an admitted offense, to bargain away by [fol. 59] stipulation his future right to be free of injunctions covering situations not yet *in esse* seem to us an adequate substitute.[6]

The Board observes in the consent cases that "it cannot be assumed that the evidence could not have supported the order." In the light of its already demonstrated approach, however, we think that such an assumption would not be unreasonable. Since the Board cries "Wolf" in every case, the cry has lost any significance. Our normal disposition is to assume, in the absence of a contrary showing, that a case is an ordinary one, rather than a special case calling for extraordinary relief. We do not think that consent makes the difference. We do not mean by this that, where no rights have been saved, a record will be scrutinized for every defect. We are not interested in errors on the merits, or in the propriety of specific relief, of which the parties have failed to complain.[7] But we regard a broad general decree as going to the root of the policies of the Act and rising above the failure of a respondent to save its rights.[8]

Nor are we aware of any urgency calling for broad orders. The Board complains that our decision means

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[6] The circumstances under which such consent is obtained are readily imaginable. General Counsel presents a broad decree. The respondent demurs. Counsel says this is our standard procedure. If respondent again demurs, counsel asks, "What is the objection? Do you intend future violations?" In this dilemma respondent, apparently, must either give in or litigate a pure matter of principle.

[7] For example, we do not consider whether the full reimbursement order in *NLRB* v. *Union de Soldadores* was warranted. *Cf. NLRB* v. *Local 176, United Bhd. of Carpenters*, 1 Cir., 1960, 276 F.2d 583, 586.

[8] We do not follow the Second Circuit in *NLRB* v. *Combined Century Theatres, Inc.*, 2 Cir., 1960 F.2d (per curiam), where the court may not have had our advantage of seeing the Board's practice outlined by a background of similar requests.

"that no 'broad' order can ever be entered by consent stipulation . . . [and the parties] will be compelled to go to hearing in order to present this Court with a record on which a 'broad' order could be sustained." This, of [fol. 60] course, is absurd.[9] All the Board has to do is to obtain from the respondent a stipulation disclosing facts which warrant broad relief. We will not go behind evidence which the parties state to be so. On the other hand, if the respondents are unwilling so to stipulate, there is no reason for the Board to complain that it cannot have such an injunction without a hearing. We can think of no irremediable disaster that will occur. If a new violation takes place, but with respect to a stranger to the present litigation, a preliminary injunction can be sought from the district court. There is no reason to think that such a procedure would take longer than a contempt action before an appellate court which is not in daily session.[10] In fact, all that the Board really loses by our decision, is the *in terrorem* effect of a ready avenue to contempt proceedings, a result we hardly believe incompatible with the policy of the Act.[11]

There remain certain miscellaneous provisions in those proposed decrees with which we are presented for the first time (items 4-7). In *Soladores* the Board's order includes the following paragraph.

> "In any other manner interferring with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement

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[9] It does seem apparent, however, that a respondent cannot settle his case under the present policy of the Board without submitting to a broad decree. See n. 5, *supra*.

[10] For example, in *Alpert* v. *United Bhd. of Carpenters*, D.C.D. Mass., 1956, 143 F.Supp. 371, and *Alpert* v. *International Typographical Union*, D.C.D.Mass., 1958, 161 F.Supp. 427, both cases of some complexity, the entire proceedings from filing to injunction took only 14 and 22 days, respectively.

[11] There is perhaps one more consequence. If the respondent commits some future unrelated act and the Board has an injunction already at hand, it is saved the trouble of conducting its own hearings. We will not assume this to be its motive.

requiring membership in a labor organization as a [fol. 61] condition of employment, as authorized by Section 8 (a) (3) of the Act."

The same language, but in shorter form, is found in *International Molded Plastics.* In this the Board seeks not simply to distinguish *NLRB* v. *Express Publishing Co., supra,* but flatly asks us to overrule it. We have neither the power nor the desire to do so. In *Levitt* and *Elci* similar paragraphs commence, "In any other like or related manner interfering with . . ." These we accept, bearing in mind that if occasion arises, we will construe them consistently with the views expressed in this opinion. Such provisions, in other words, have a proper place to prevent "easy evasion."

Orders and decrees will be entered in conformity with this opinion.

[fol. 62] IN THE UNITED STATES
COURT OF APPEALS

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ORDER OF COURT DENYING SECOND MOTION FOR RECONSIDERATION—October 18, 1960

It is ordered that the Second Motion for Reconsideration filed herein by petitioner on August 8, 1960, be, and the same hereby is, denied.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Approved:

/s/ PETER WOODBURY
Ch. J.

• • • •

[fol. 63] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 64] SUPREME COURT OF THE UNITED STATES

No. 654, October Term, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

OCHOA FERTILIZER CORPORATION ET AL.

ORDER ALLOWING CERTIORARI—March 6, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1961 580456 1163

assert jurisdiction," in accordance with the cease and desist provision quoted above.

In addition, the stipulation provided that "any United States Court of Appeals for any appropriate circuit may on application by the Board, enter a decree enforcing the Order of the Board" issued in accordance with the stipulation, and that "Respondents waive all defenses to entry of the decree * * *" (Stip. 10, ¶ VIII).

On March 16, 1960, the Board, approving the stipulation, entered an order following its terms in all respects, including the references to the respondent unions "or any other labor organization" and the respondent company "or any other employer * * *" quoted above. On June 14, 1960, the Board, pursuant to the stipulation, petitioned the court below for a decree enforcing the order.

On July 8, 1960, the court, *sua sponte,* modified the Board's order and notice by striking the phrases "or any other labor organization" and "or any other employer over which the Board will assert jurisdiction" wherever they occurred, and, as so modified, enforced the order (pp. 7–9, *infra*). The Board filed two motions for reconsideration. The first was denied on August 3, 1960 (*infra,* pp. 7–9). The second was denied on October 18, when the court in a single opinion upheld its modification of uncontested orders entered by the Board in seven different cases (*infra,* pp. 10–21).[2]

[2] The Board is petitioning for certiorari in three of those seven cases: (1) the instant case; (2) *National Labor Relations Board* v. *Las Vegas Sand and Gravel Corp;* and (3) *National Labor Relations Board* v. *Local 476, Plumbers.*

REASONS FOR GRANTING THE WRIT

This case presents the same question as that involved in *National Labor Relations Board* v. *Brandman Iron Co.*, 281 F. 2d 797 (C.A. 6), pending before this Court on petition for certiorari, No. 646, this Term—*i.e.*, whether the court of appeals has power under the Act to modify an order which was not contested before the Board. As shown in the Board's petition in *Brandman*, to which we respectfully refer the Court, the view of the court below is contrary to decisions of this Court and in conflict with those of other circuits. Moreover, the question presented is of importance in the administration of the Act.

For the foregoing reasons, this petition for certiorari should be granted, or, in the alternative, held in abeyance pending a decision on the question in *Brandman*.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

JANUARY 1961.

No. [redacted] 57

In the Supreme Court of the United States

October Term, 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

OCEAN ELECTRICAL CORPORATION; LOCAL 1762, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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CITATIONS

Cases:

National Labor Relations Board v. *Brandman Iron Company*, 281 F. 2d 797, petition for certiorari pending, No. 646, this term 2, 5

National Labor Relations Board v. *Las Vegas Sand & Gravel Corp.*, 283 F. 2d 26 3

National Labor Relations Board v. *Local 476, Plumbers*, 283 F. 2d 26 3

Statute:

National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*):

Section 8 ..... 2, 3

Section 10 2

580694—61——1

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

OCHOA FERTILIZER CORPORATION; LOCAL 1762, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered on July 8, 1960, modifying an order issued by the Board against respondents.

OPINION BELOW

The court of appeals filed no opinion in support of its original decree. Its opinion denying the Board's second motion for reconsideration (*infra*, pp. 10–21), is reported at 283 F. 2d 26. The Board's decision and order is unreported.

JURISDICTION

The court of appeals entered its decree on July 8, 1960, and denied the Board's motion for reconsidera-

tion on August 3, 1960 (*infra*, pp. 7–9). A second Board motion for reconsideration was denied on October 18, 1960 (*infra*, p. 22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether the court of appeals has power under Section 10(e) of the National Labor Relations Act to modify an order entered by the National Labor Relations Board, where the respondents, in a settlement agreement, had consented to the order and to its enforcement by the court.

STATUTE INVOLVED

The relevant provisions of Section 10 of the National Labor Relations Act (61 Stat. 146, as amended, 29 U.S.C. 160) are set forth at pp. 14–15 of the Board's petition for certiorari filed in the companion case, *National Labor Relations Board* v. *Brandman Iron Co.*, No. 646, this Term.

STATEMENT

Following charges by an individual employee, the Board issued a complaint against the respondent company and unions alleging that they had violated, respectively, Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the Act by executing and maintaining an agreement which vested the union with exclusive control over hiring and conditioned employment upon union membership, and further provided for the check off of union dues and fees.

Thereafter, the respondents, the charging party, and the Regional Director entered into a settlement stipulation whereby respondents waived all further proceedings before the Board, and agreed to the issuance of a Board order directing: (1) the respondent companies to refrain from performing, maintaining or giving effect to such an agreement with the respondent unions "or any other labor organization" (Stip. 4, ¶ A1 (a), (b)),[1] and from encouraging membership in respondent unions "or any other labor organization" by unlawful discrimination as to hire, tenure, or terms or conditions of employment (Stip. 5, ¶ A1(d)); and (2) the respondent unions to refrain from performing, maintaining, or giving effect to such an agreement with the respondent company "or any other employer, over which the Board will assert jurisdiction" (Stip. 7–8, ¶ B1 (a) and (b)), and from causing or attempting to cause the respondent company "or any other employer over which the Board will assert jurisdiction" to discharge, refuse to hire, or otherwise discriminate against any employee in violation of Section 8(a)(3) of the Act (Stip. 8, ¶ B1(d)).

The stipulation also provided for the reimbursement of the monies collected under the unlawful check-off agreement during the preceding six months, and for the posting of notices of compliance, containing, *inter alia,* references to "any other labor organization" and to "any other employer over which the Board will

[1] No record was printed for use in the court of appeals, and all references are to the original documents included in the certified record filed with this court.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5698.

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

OCHOA FERTILIZER CORPORATION ET AL., RESPONDENTS.

DECREE.

July 8, 1960.

This cause was submitted on "Petition for Enforcement of an Order of the National Labor Relations Board upon Stipulation of the Parties for Consent Decree", and the record of proceedings before said Board.

Upon consideration whereof, It is ordered and decreed as follows: The order of the National Labor Relations Board of March 16, 1960, as modified herein, and with the exception of paragraphs A2(e) and B2(e), is hereby affirmed and enforced.

Paragraph A1(a) of said order is modified by striking therefrom the words "or any other labor organization" and "or by any other labor organization".

Paragraph A1(b) of said order is modified by striking therefrom the words "or any other labor organization" as they appeared twice therein.

Paragraph A1(d) is modified by striking therefrom the words "or any other labor organization".

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Paragraph B1(a) of said order is modified by striking therefrom the words "or any other employer, over which the Board will assert jurisdiction".

Paragraph B1(b) of said order is modified by striking therefrom the words "or with any other employer, over which the Board will assert jurisdiction.".

Paragraph B1(d) of said order is modified by striking therefrom the words "or any other employer over which the Board will assert jurisdiction,".

The first indented paragraph of the notice appended to said order as Appendix "A" is modified by striking therefrom the words "or any other labor organization" and "or by any other labor organization".

The second indented paragraph of the notice appended to said order as Appendix "A" is modified by striking therefrom the words "or any other labor organization" as they appeared twice therein.

The fourth indented paragraph of the notice appended to said order as Appendix "A" is modified by striking therefrom the words "or any other labor organization".

The first indented paragraph of the notice appended to said order as Appendix "B" is modified by striking therefrom the words "or any other employer, over which the National Labor Relations Board will assert jurisdiction" and "or any other labor organization".

The second indented paragraph of the notice appended to said order as Appendix "B" is modified by striking therefrom the words "or any other employer, over which the National Labor Relations Board will assert jurisdiction," and "or any other labor organization".

The fourth indented paragraph of the notice appended to said order as Appendix "B" is modified by

striking therefrom the words "or any other employer over which the National Labor Relations Board will assert jurisdiction,".

It is further ordered that respondents herein notify the Regional Director for the Twenty-fourth Region in writing within thirty (30) days from the date of this Decree of the steps they have taken to comply with said order as herein modified, and affirmed and enforced.

By the Court:

/s/ ROGER A. STINCHFIELD,
Clerk.

A true copy:
Attest:

ROGER A. STINCHFIELD,
Clerk.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5698

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

OCHOA FERTILIZER CORPORATION ET AL., RESPONDENTS.

ORDER OF COURT

August 3, 1960

It is ordered that the Motion for Reconsideration filed herein by petitioner on July 28, 1960, be, and the same hereby is, denied.

By the Court:

ROGER A. STINCHFIELD, *Clerk.*
By /s/ DANA H. GALLUP,
Chief Deputy Clerk.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5698.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

OCHOA FERTILIZER CORPORATION ET AL., RESPONDENTS.

ON SECOND MOTION FOR RECONSIDERATION OF A DECREE.

No. 5691. SAME *v.* LAS VEGAS SAND AND GRAVEL CORPORATION.

ON SECOND MOTION FOR RECONSIDERATION OF A DECREE.

No. 5590. SAME *v.* LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO AND ITS BUSINESS AGENT, WILLIAM O'BRIEN.

ON PETITION FOR REHEARING.

No. 5728. SAME *v.* LEVITT CORPORATION; JOHN V. SULLIVAN AND KENSEAN CORPORATION.

ON PETITION FOR ENFORCEMENT UPON STIPULATION FOR CONSENT DECREE.

No. 5729. SAME *v.* ELCI PRODUCTS CORPORATION.

ON PETITION FOR ENFORCEMENT UPON STIPULATION FOR CONSENT DECREE.

No. 5736. SAME *v.* UNION DE SOLDADORES, MECANICOS, MONTADORES DE ACERO, AUXILIARES Y RAMAS ANEXAS, LOCAL 1839 ILA-IND AND INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, DISTRICT COUNCIL OF THE PORTS OF PUERTO RICO, ILA-IND.

ON PETITION FOR SUMMARY ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

No. 5740. SAME *v.* INTERNATIONAL MOLDED PLASTICS OF PUERTO RICO, INC.

ON PETITION FOR SUMMARY ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

OPINION OF THE COURT.

October 18, 1960.

ALDRICH, *Circuit Judge.* During the past two months we have accumulated for simultaneous disposition a number of motions by the Labor Board which, for one reason or another, are uncontested.[1] We here consider (1) a second motion for reconsideration of a decree entered following stipulations by the parties in *NLRB* v. *Ochoa Fertilizer Corp.,* where we granted less relief than the respondents had agreed to; (2) the same in *NLRB* v. *Las Vegas Sand and Gravel Corp.;* (3) petition for rehearing filed in *NLRB* v. *Local 476, United Ass'n of Journeymen*

[1] In item 7, *infra,* the respondents have sought to file exceptions late. We are not satisfied from a review of the entire record that the Board erred in holding that respondents had presented an inadequate excuse for having failed to act with due expedition.

and Apprentices of the Plumbing Industry, 1 Cir., 1960, 280 F. 2d 441; (4) motion for decree following stipulation in *NLRB* v. *Levitt Corp.;* (5) the same in *NLRB* v. *Elci Products Corp.;* (6) petition for summary decree after hearing in *NLRB* v. *Union de Soldadores;* (7) the same in *NLRB* v. *International Molded Plastics of Puerto Rico, Inc.* The questions presented by the several motions are not identical, but they all involve the appropriate breadth of a Board order. In each of these cases the Board seeks an order which would enjoin respondent, or respondents, therein from engaging in some particular proscribed conduct not only with respect to the immediately involved party but with respect to "any other" party. We will characterize such orders as broad, although in some instances the Board asserts otherwise.[3]

In the *Ochoa Fertilizer* case it was charged that the respondent employer illegally maintained a closed or preferential shop agreement with the respondent union. The complaint filed by the Board alleged violation of sections 8(a) (1), (2) and (3), and 8(b) (1)(A) and (2) of the National Labor Relations Act. No hearing was held, but a stipulation was filed in which both respondents admitted the charges and agreed to the entry of a broad order. The employer was to be enjoined from agreeing with the respondent union, "or any other labor organization," with respect to unlawful discrimination in favor of its members, or person approved by it, with regard to hiring or conditions of employment. Similarly, the union

[3] No question is involved here, in spite of frequent references to the matter by the Board, of phrasing a decree with sufficient breadth to forestall "easy evasion." *McComb* v. *Jacksonville Paper Co.*, 1949, 336 U.S. 187, 193; *International Bhd. of Electrical Workers* v. *NLRB*, 1951, 341 U.S. 694, 705–6.

was to be enjoined from making any unlawful preferential arrangements with Ochoa Fertilizer Corp., "or any other employer." Both respondents agreed that the appropriate Court of Appeals could enter decrees pursuant to the stipulation without notice, hearing or objection. After we had excised, *nostra sponte,* from the proposed form of decree all references to "any other labor organization" and "any other employer," the Board moved for reconsideration, and we denied the motion. It has now moved for further reconsideration.

In the *Las Vegas* case the situation is in all respects similar, except that the charges, based on alleged violations of sections 8(a) (1) and (3) of the act, were of various unlawful activities interfering with respondent's employees' joining Local 925 of the charging union. The Board's order, following a stipulation of the parties, forbade the employer to engage in such activities directed against "the union, or any other labor organization." We excised the phrase "or any other labor organization," and thereafter denied a motion for reconsideration. Again, the Board moves for further reconsideration.

In item (3), *NLRB* v. *Local 476, United Ass'n of Journeymen and Apprentices of the Plumbing Industry,* 1 Cir., 1960, 280 F. 2d 441, a section 8(b)(4)(A) case, the respondent union was found to have induced a strike against Joseph P. Cuddigan, Inc., the secondary employer, in order to assist its dispute with the E. Turgeon Construction Company for whom Cuddigan was doing subcontracting work. The Board's proposed order forbade inducing the employees of Cuddigan "or of any other employer" to strike for the purpose of inducing Cuddigan "or any other employer or person" to cease doing business with Turgeon "or any other company." We struck the quoted phrases.

NLRB v. *Levitt Corp.*, item (4), is an action against three employers arising out of charges of discrimination by the local chapter of the United Brotherhood of Carpenters and Joiners. As in *Local 476* the charges made no reference to any other union. However, a complaint was filed asserting violations of section 8(a) (1) and (3) by reason of unlawful activities discouraging membership in the union "or any other labor organization." The quoted phrase of the complaint was purely conclusory. Thereafter a stipulation was filed in which each employer consented to a decree enjoining activities directed against "the Carpenters Union or any other labor organization." No facts are adduced in this stipulation which go beyond the specific allegations of the charges, and there is no affirmative indication that any other labor organization may be involved, presently or prospectively.

(5) *NLRB* v. *Elci Products Corp.* is in all respects similar, in origin and in proposed disposition, to the *Levitt* case, except that the specific activities charged are even more restricted in extent, if not in character.

(6) In *NLRB* v. *Union de Soldadores*, a discharged employee filed charges against the local and its parent union, hereinafter called the District Council, asserting that he had lost employment because of the respondents' maintenance of an illegal preferential hiring agreement in violation of sections 8(b) (1)(A) and (2). The District Council was defaulted, and the local took no exceptions to the findings or recommendations of the trial examiner following the hearing. The examiner proposed that the respondents be enjoined from enforcing any agreement with the particular employer, Abarca, Inc., whereby unlawful preference would be extended to their members. The

Board enlarged this to read "Abarca, Inc., or any other employer over which the board will assert jurisdiction." The record does not reveal any special circumstances which could support this amplification.[3]

NLRB v. *International Molded Plastics of Puerto Rico, Inc.*, item (7), is a complaint alleging violation of sections 8(a) (1) and (3), in all respects similar to *Las Vegas*. However, in this instance we have a full report of the testimony and findings of the examiner, the case being one in which the Board moves for summary entry of a decree. Here, again, it is plain on the record that only the one union, and no generalized course of conduct, is involved.

In the aggregate this exhibits a marked fondness on the part of the Board for broad decrees. We might add to this list our recent cases of *NLRB* v. *Bangor Bldg. Trades Council*, 1 Cir., 1960, 278 F. 2d

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[3] In a memorandum in support of this particular order the Board seeks to distinguish the *Ochoa Fertilizer* and *Las Vegas* cases on the ground that "in the instant case . . . the Board's *findings* support the order in the terms in which it was entered. The findings show, for example . . ." (Ital. suppl.) The "examples" given are: (a) a statement that the charging party "testified" that he paid a fee to the District Council while previously working for some other employer; (b) a statement that, at the request of the District Council, he had been discharged by that other employer, which discharge is "the subject of another unfair labor practice proceeding . . ." We have had occasion before to point out that a recitation of testimony is not a "finding." *NLRB* v. *Local 176, United Bhd. of Carpenters*, 1 Cir., 1960, 276 F. 2d 583, 584. *A fortiori*, a statement that a matter is presently the subject of another proceeding is not a "finding." *Cf. NLRB* v. *Local 926, Int'l Union of Operating Eng'rs*, 5 Cir., 1959, 267 F. 2d 418, 420. If by the use of the words "for example" counsel means to suggest that there are other special findings in the record which support his contention, we can only say that a careful search has failed to discover them. Counsel should not place such a burden upon us.

287, and *NLRB* v. *Local 111, United Bhd. of Carpenters*, 1 Cir., 1960, 278 F. 2d 823. In no case in which the record before us revealed the evidence available to the Board [4] was there any evidence of similar misconduct directed towards other employers, or other labor organizations. On this substantial showing we must at least suspect that the Board uses the broad form of decree as a matter of course. This suspicion is confirmed by the Board's memoranda presently before us. We do not approve of such a practice.

An order, when implemented by us, becomes an injunction. The Supreme Court emphasized this in exercising overly broad portions of a Board order in *NLRB* v. *Express Publishing Co.*, 1941, 312 U.S. 426; see Note, 1944, 54 Yale L.J. 141—affirmative reasons must appear to warrant broad injunctions. *Express Publishing Co.* [w]as recently reaffirmed in *Communications Workers* v. *NLRB*, 1960, 362 U.S. 479, a section 8(b)(1)(A) case, where the court held, virtually without discussion, that because there was no evidence of a "generalized scheme" a union's interference with the employees of one particular employer could not justify a decree against activity with relation to the employees "of any other employer." The Board, however, draws a very narrow lesson.[5] In *Las Vegas*,

[4] This includes *Local 111* because, although that case came up on a petition for summary enforcement, due to the respondent's having failed to file objections or exceptions, we had the findings of the examiner containing a detailed account of the evidence. It does not include the consent cases, with which we shall deal separately.

[5] In *Soldaderes* and *International Molded Plastics* it draws none at all. See *infra*. In connection with *Ochoa Fertilizer* it asserts that the *Communication Workers* case is not applicable since particular coercive conduct is distinguishable from an unlawful hiring arrangement, and that there is "more reason" to expect that the latter will be repeated. This "reason" is not

where there is no suggestion in the record of any other union's being in the picture, a request is made for a decree which would subject the employer to contempt proceedings if it engaged in the prohibited conduct, not only with respect to the charging union, but as to "any other labor organization." The Board argues, "If respondent's employees should evince interest in another union . . . [they should] be protected if they exercise their statutory right to 'form, join, or assist' another union." "It is not unreasonable to infer that [the employer] would repeat his conduct if they tried to organize another." (This last contention was watered down in *Ochoa Fertilizer* to say it is not "unreasonable to infer that [the union] *may* engage in similar hiring practices with other[s]." (Ital. suppl.) These are the same unsubstantiated suppositions the court held to be insufficient. Again, in *Local 476,* where there was no evidence of any pattern or general course of conduct, the Board, without reference to this fact, openly states that its order was addressed broadly, "as is uniformly the case where the Boards finds a violation of section 8(b)(4)(A)." See also *NLRB* v. *International Molded Plastics,* likewise tried on the merits.

We cannot avoid the conclusion that the Board finds it proper to take a single offense as establishing the "generalized scheme" (*Communication Workers* v. *NLRB, supra*), "proclivity" (*McComb* v. *Jacksonville Paper Co., supra,* at 192), or "pattern" (*NLRB* v. *Brewery and Beer Distributor Drivers,* 3 Cir., 1960, F. 2d), necessary to warrant wholesale relief. Its logic, in the face of the clear pronouncements of the Court, escapes us. In those cases in which the record makes it apparent that there was but

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clear to us, and in view of what we find to be the Board's general practice it seems in the nature of an afterthought.

a single party involved we will not grant it. *NLRB* v. *United Bhd. of Carpenters,* 7 Cir., 1960, 276 F. 2d 694; *NLRB* v. *Local 926, Int'l Union of Operating Eng'rs,* 5 Cir., 1959, 267 F. 2d 418, 420; *International Bhd. of Teamsters* v. *NLRB,* D.C. Cir., 1958, 262 F. 2d 456, 462.

We turn to the consent cases, in which no evidence is presented by the record. The Board contends that we have "no right" not to enter the decree that the parties have stipulated to. It cites *NLRB* v. *Cheney California Lumber Co.,* 1946, 327 U.S. 385, for the proposition that in the absence of timely objection by the respondent, this court must enforce any order propounded by the Board. In our opinion that case stands for no such proposition. The court there was careful to point out that findings of record disclosed a "course of conduct against which such an order may be the only proper remedy." *Id.* at 389. It was equally careful to point out that the situation would be different if the Board had "patently traveled outside the orbit of its authority." *Id.* at 388. We readily concur that we have no right to deny enforcement of an order warranted by the record. This concession does not advance the matter, however, for we equally have no right to enter one which is not warranted. The question is, what does the record warrant.

An injunction broader than the need is not only contrary to all established equitable principles, but it is peculiarly inappropriate in the sensitive area of labor relations where abuses formerly rampant under broadly and vaguely worded decrees are legendary. See, *e.g.,* Frankfurter and Greene, The Labor Injunction, Ch. III (1930). The Norris-LaGuardia Act, 29 U.S.C. §§ 101–115, put an end to these abuses in the federal courts, and the broad principle for which

it stands has not been compromised by subsequent labor legislation. Nor should it be by any "expertise" of the Board. We have seen that the Board's conclusion that "it is reasonable to infer" that a single offender will be an habitual one falls far short of the necessary showing. Nor does the willingness of a party, apprehended in an admitted offense, to bargain away by stipulation his future right to be free of injunctions covering situations not yet *in esse* seem to us an adequate substitute.[6]

The Board observes in the consent cases that "it cannot be assumed that the evidence could not have supported the order." In the light of its already demonstrated approach, however, we think that such an assumption would not be unreasonable. Since the Board cries "Wolf" in every case, the cry has lost any significance. Our normal disposition is to assume, in the absence of a contrary showing, that a case is an ordinary one, rather than a special case calling for extraordinary relief. We do not think that consent makes the difference. We do not mean by this that, where no rights have been saved, a record will be scrutinized for every defect. We are not interested in errors on the merits, or in the propriety of specific relief, of which the parties have failed to complaint.[7] But we regard a broad general decree as

[6] The circumstances under which such consent is obtained are readily imaginable. General Counsel presents a broad decree. The respondent demurs. Counsel says this is our standard procedure. If respondent again demurs, counsel asks, "What is the objection? Do you intend future violations?" In this dilemma respondent, apparently, must either give in or litigate a pure matter of principle.

[7] For example, we do not consider whether the full reimbursement order in *NLRB* v. *Union de Soldadores* was warranted. *Cf. NLRB* v. *Local 176, United Bhd. of Carpenters*, 1 Cir., 1960, 276 F. 2d 583, 586.

going to the root of the policies of the Act and rising above the failure of a respondent to save its rights.[8]

Nor are we aware of any urgency calling for broad orders. The Board complains that our decision means "that no 'broad' order can ever be entered by consent stipulation . . . [and the parties] will be compelled to go to hearing in order to present this Court with a record on which a 'broad' order could be sustained." This, of course, is absurd.[9] All the Board has to do is to obtain from the respondent a stipulation disclosing facts which warrant broad relief. We will not go behind evidence which the parties state to be so. On the other hand, if the respondents are unwilling so to stipulate, there is no reason for the Board to complain that it cannot have such an injunction without a hearing. We can think of no irremediable disaster that will occur. If a new violation takes place, but with respect to a stranger to the present litigation, a preliminary injunction can be sought from the district court. There is no reason to think that such a procedure would take longer than a contempt action before an appellate court which is not in daily session.[10] In fact, all that the Board really loses by our decision, is the *in terrorem* effect of a ready avenue to contempt pro-

[8] We do not follow the Second Circuit in *NLRB* v. *Combined Century Theaters, Inc.*, 2 Cir., 1960, F. 2d (per curiam), where the court may not have had our advantage of seeing the Board's practice outlined by a background of similar requests.

[9] It does seem apparent, however, that a respondent cannot settle his case under the present policy of the Board without submitting to a broad decree. See n. 5, *supra*.

[10] For example, in *Alpert* v. *United Bhd. of Carpenters*, D.C.D. Mass., 1956, 143 F. Supp. 371, and *Alpert* v. *International Typographical Union*, D.C.D. Mass., 1958, 161 F. Supp. 427, both cases of some complexity, the entire proceedings from filing to injunction took only 14 and 22 days, respectively.

ceedings, a result we hardly believe incompatible with the policy of the Act.[11]

There remain certain miscellaneous provisions in those proposed decrees with which we are presented for the first time (items 4–7). In *Soldadores* the Board's order includes the following paragraph.

> In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

The same language, but in shorter form, is found in *International Molded Plastics.* In this the Board seeks not simply to distinguish *NLRB* v. *Express Publishing Co., supra,* but flatly asks us to overrule it. We have neither the power nor the desire to do so. In *Levitt* and *Elci* similar paragraphs commence, "In any other like or related manner interfering with . . ." These we accept, bearing in mind that if occasion arises, we will construe them consistently with the views expressed in this opinion. Such provisions, in other words, have a proper place to prevent "easy evasion."

Orders and decrees will be entered in conformity with this opinion.

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[11] There is perhaps one more consequence. If the respondent commits some future unrelated act and the Board has an injunction already at hand, it is saved the trouble of conducting its own hearings. We will not assume this to be its motive.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5698.

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

OCHOA FERTILIZER CORPORATION ET AL., RESPONDENTS.

ORDER OF COURT.

October 18, 1960.

It is ordered that the Second Motion for Reconsideration filed herein by petitioner on August 8, 1960, be, and the same hereby is, denied.

By the Court:

/s/ ROGER A. STINCHFIELD,
Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1961

No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

OCHOA FERTILIZER CORPORATION; LOCAL 1762, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
MARNIE S. PEDERSEN,
Attorney,
National Labor Relations Board,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 37

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

OCHOA FERTILIZER CORPORATION; LOCAL 1762, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINION BELOW

The court of appeals filed no opinion in support of its original decree (R. 53–54). Its opinion denying the Board's second motion for reconsideration (R. 60–69) is reported at 283 F. 2d 26. The Board's decision and order (R. 37–49) are unreported.

JURISDICTION

The court of appeals entered its decree (R. 53–54) on July 8, 1960, and denied the Board's motion for reconsideration on August 3, 1960 (R. 55). The Board's second motion for reconsideration (R. 56–58) was denied on October 18, 1960 (R. 69). The petition for a writ of certiorari was filed on January 16, 1961,

and granted on March 6, 1961 (R. 70; 365 U.S. 833). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE AND RULE INVOLVED

The relevant provisions of Section 10 of the National Labor Relations Act, 61 Stat. 146, as amended, 29 U.S.C. 160, and Sections 101.9 and 102.46 of the Statements of Procedure of the National Labor Relations Board, 24 Fed. Reg. 9095, *et seq.*, are set forth in the Appendix, *infra*, pp. 25–29.

QUESTION PRESENTED

Whether the court of appeals erred in modifying a National Labor Relations Board order where the respondents, in a settlement agreement executed prior to hearing, had consented to the order and to its enforcement by the court.[1]

STATEMENT

A. THE BOARD PROCEDURE IN HANDLING UNFAIR LABOR PRACTICES CASES

When an unfair labor practices complaint, issued by the General Counsel of the Board is contested, the case goes to hearing before a trial examiner, who, on the basis of the evidence, issues a proposed report, containing findings of fact and conclusions of law, and a recommended order. Section 10(c) of the Act (App.,

[1] A related question is presented in *Federal Trade Commission* v. *Henry Broch and Company*, No. 74, this Term, set for argument after the present case, 366 U.S. 923.

infra, p. 25) provides that, "if no exceptions are filed within twenty days * * * such recommended order shall become the order of the Board." If exceptions to the trial examiner's report are filed, the case goes to the Board, which considers the matters to which exceptions have been taken.[2] Should the Board conclude that unfair labor practices have been committed, it then issues a decision setting forth its findings and order.

In many cases, however, the parties decide to avoid the time and expense of litigation by entering into either an informal or formal settlement agreement. In ordinary cases an informal agreement is all that is required; it provides for the posting of an appropriate notice, after which the unfair labor practice charges are withdrawn.[3] When the investigation has revealed a flagrant violation of the statute or a history of conduct demonstrating the likelihood of repeated violations, a formal agreement is required. The formal agreement, which is entered into simultaneously with, or just after, issuance of a complaint based on the charges, provides that the Board may, without a hearing or further proceedings, issue a specified order; in addition, it usually provides that the Board may, without contest by the parties, apply to the appropriate court of appeals for entry of a decree enforcing

[2] See Section 102.46, Board Statements of Procedure, App., *infra*, pp. 27–29.

[3] Silverberg, *How to Take a Case Before the National Labor Relations Board* (BNA, 1959), p. 213; see *Poole Foundry & Machine Co.* v. *National Labor Relations Board*, 192 F. 2d 740 (C.A. 4), certiorari denied, 342 U.S. 954.

the Board's order.[4] A formal settlement agreement ordinarily does not require the parties to stipulate particular facts establishing the unfair labor practices.[5]

B. THE CONSENT ORDER ENTERED BY THE BOARD

In the present case, the formal settlement procedure was used. Upon charges filed by an individual employee (R. 1–2, 5–12), a complaint was issued against the respondent company and unions alleging that they had violated, respectively, Sections 8(a) (1), (2) and (3) and 8(b) (1)(A) and (2) of the Act by executing and maintaining an agreement which conditioned employment upon union membership, vested the unions with exclusive control over hiring, and provided for the checkoff of union dues and fees (R. 13–20).

Thereafter, the respondents, the charging party, and the Regional Director entered into a settlement agreement under which the respondents waived "a hearing, an Intermediate Report of a Trial Examiner, the filing of exceptions to such Intermediate Report, oral arguments before the Board and all further and other proceedings" before the Board (R. 23, par. V), and agreed to the exact terms, and the issuance, of a Board order (1) directing the

[4] Silverberg, *supra*, pp. 222, 228; see Section 101.9, Board Statements of Procedure, App., *infra*, pp. 26–27.

[5] See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 159; *National Labor Relations Board* v. *J. L. Hudson Co.*, 185 F. 2d 380, 384 (C.A. 6), certiorari denied, 320 U.S. 740.

respondent company to refrain from performing, maintaining or giving effect to such an agreement with the respondent unions "or any other labor organization" (R. 24, pars. (a), (b)), and from otherwise unlawfully encouraging membership in respondent unions "or any other labor organization" by discrimination as to hire, tenure, or terms or conditions of employment (R. 25, par. (d)), and (2) directing the respondent unions to refrain from performing, maintaining or giving effect to such an agreement with the respondent company "or any other employer, over which the Board will assert jurisdiction" (R. 27, pars. (a), (b)), and from otherwise causing or attempting to cause the respondent company "or any other employer over which the Board will assert jurisdiction" to discharge, refuse to hire, or otherwise discriminate against any employee in violation of Section 8(a)(3) of the Act (R. 27–28, par. (d)). The stipulation further provided for the posting of notices of compliance, containing references to "any other labor organization" and to "any other employer over which the Board will assert jurisdiction," in accordance with the provisions of the cease and desist order (R. 31–35).

In addition, the stipulation provided that "any United States Court of Appeals for any appropriate circuit may on application by the Board, enter a decree enforcing the Order of the Board * * *" issued in accordance with the stipulation, and that "Respondents waive all defenses to entry of the decree * * *" (R. 29, par. VIII).

On March 16, 1960, the Board approved the stipulation and entered an order in the agreed terms, including the references to the respondent unions "or any other labor organization" and the respondent company "or any other employer over which the Board will assert jurisdiction" (R. 37–44). On June 14, 1960, the Board, pursuant to the stipulation, petitioned the United States Court of Appeals for the First Circuit for a decree enforcing the order (R. 50–52).

C. THE DECISION OF THE COURT OF APPEALS

Despite the fact that the scope of the order was contested neither before the Board nor the court, the court, on July 8, 1960, *sua sponte,* modified the Board's order and notice by striking the phrases "or any other labor organization" and "or any other employer over which the Board will assert jurisdiction" wherever they occurred, and enforced the order as modified (R. 53–54). The Board filed a motion for reconsideration which was denied without opinion on August 3, 1960 (R. 55). On August 5, 1960, the Board filed a second motion (R. 56) requesting reconsideration in the light of the Second Circuit's opinion of August 3, 1960, in *National Labor Relations Board* v. *Combined Century Theatres, Inc.,* 46 LRRM 2858 (R. 57–58), which upheld the Board's view that the court was without jurisdiction to modify an order entered pursuant to a stipulation agreement. On October 18, 1960, the court denied the second motion in an opinion covering the pres-

ent case and six others in which it had similarly modified uncontested orders entered by the Board (R. 59–60).* In the course of its opinion, the court referred to previous cases in which the Board had entered broad orders held to be not warranted by the record (R. 62–64). The court thereupon concluded that a broad order could not be justified in the present case when "no evidence is presented by the record" (R. 66), and held that it possessed power, notwithstanding the stipulated settlement agreement, to modify the order, because it regarded (R. 67) " * * * a broad general decree as going to the root of the policies of the Act and rising above the failure of a respondent to save its rights."

SUMMARY OF ARGUMENT

I

The action of the court below is contrary to Section 10(e) of the Act (App., *infra*, p. 2ɔ). Section 10(e) provides that, upon review of a Board order in an appropriate court of appeals, "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." In

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*In addition to the present case, the Board has petitioned for certiorari in two other cases disposed of by the First Circuit's opinion: *National Labor Relations Board* v. *Las Vegas Sand and Gravel Corp.*, No. 38, this Term: *National Labor Relations Board* v. *Local 476, Plumbers*, No. 39, this Term. See also, *National Labor Relations Board* v. *Brandman Iron Company*, No. 35, this Term.

National Labor Relations Board v. *Cheney California Lumber Co.*, 327 U.S. 385, the Court held that, since "Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board" (*id.* at 389), Section 10(e) precludes a court of appeals from narrowing the scope of a Board order which was not contested before the Board. Thus, when no objection to the order is presented to the Board, it has no opportunity to make an evaluation for the reviewing court. Accordingly the court is required to assume that a sufficient basis for the order exists and "render judgment on consent" (*ibid.*).

Neither *National Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, nor *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, supports the court's decree. Contrary to the facts of the present case, the Board in those cases had considered the scope of the orders in the light of the evidence and findings of record before arriving at its ultimate decisions. Section 10(e), therefore, interposed no procedural bar to judicial review on the merits.

Moreover, the court below erred in basing its refusal to enforce the broad order on what it believed to be deficiencies in the record. Although in *Cheney* the evidentiary basis for the order was disclosed in the record, in the present case, since the respondents by agreement had waived a hearing and had failed to stipulate underlying facts, there was no need for evi-

dence or findings of fact to support the consent order. The procedural difference between the two cases—the presence of evidence in one and its absence from the other—has no relevance because in both cases the enforcing court was precluded by Section 10(e) from reviewing the basis of the order.

II

The lack of any evidence or findings of fact cannot serve as a basis for the court to modify an order entered in accordance with the consent of the parties concerned, since, under the rule prevailing in the federal courts, "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause," regardless of whether evidence in the record supports the decree. The court below was therefore in error in reviewing the "merits" of the order.

III

Especially since the *Communication Workers* case, the Board has been alert to insure that broad orders are used only in situations where they are justified by the facts of the particular case. If the court's holding were to be sustained, the effectiveness of the consent procedure, by which the Board handles much of its caseload, would be seriously weakened. Since respondents are usually unwilling to stipulate to the underlying facts supporting the conclusions of law as to unfair labor practices, the consequence of the position taken by the court is that no broad order, however appropriate in the circumstances, could be ob-

tained without formal litigation, even though the respondents should not wish to litigate.

ARGUMENT

I

THE FACT THAT NO OBJECTION TO THE ORDER WAS URGED BEFORE THE BOARD PRECLUDED THE COURT BELOW FROM REVIEWING THE ORDER ON THE MERITS

A. The action of the court below is contrary to Section 10(e) of the National Labor Relations Act

Although Section 10(e) of the Act (App., *infra*, p. 26) empowers a court of appeals to enforce, modify or set aside a Board order, that Section also imposes a qualification on the court's authority, in that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388. In the *Cheney* case, the Court explained this qualification (*id.* at 389 (emphasis added)): "By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render *judgment on consent* as to all issues that were contestable before the Board but were in fact not contested." Accordingly, when an unfair labor practice case has gone to a hearing and the trial examiner has issued an intermediate report recommending a remedial order, any objections to the examiner's findings of fact or conclusions of law, or to any portion of his recommended order, not challenged before the Board by specific,

timely exceptions are deemed waived and may not be reviewed by the court in subsequent proceedings to enforce the Board's order, absent a showing of extraordinary circumstances which excuse the failure to take exceptions.[7] Moreover, when no timely exceptions are filed, the recommended order, by virtue of Section 10(c) of the Act (App., *infra*, p. 25) automatically becomes the order of the Board.[8] Since no part of the

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[7] See, *e.g.*, *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386, n. 5; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350; *National Labor Relations Board* v. *District 50, United Mine Workers of America*, 355 U.S. 453, 463–464; *National Labor Relations Board* v. *Pinkerton's Nat'l Detective Agency*, 202 F. 2d 230, 232–233 (C.A. 9). See, also, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 496–501; *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

[8] Section 10(c) was added to the Act in 1947. Its purpose was explained by Senator Taft, as follows (93 Cong. Rec. 6860, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1625)):

> Section 10(c): In an effort to lessen the work load of the Board and facilitate its disposition of cases this subsection was amended to give finality to recommended orders of trial examiners without Board review if no exceptions were taken within 20 days. It has been stated that this permits an unsuccessful litigant to stand idly by while an erroneous report of a trial examiner becomes the order of the Board and then embarrass the Board when the case goes into the courts for enforcement. Several checks would prevent this happening. Section 10[(e)] provides, "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court." In addition, the attorney trying the case would presumably file exceptions to such a report and the General Counsel in any event would not go forward with enforcement if the order was erroneous.

trial examiner's findings or order is open for Board consideration, none is open for court review (at least absent a showing of extraordinary circumstances for the failure to take exceptions), and the court is required summarily to enforce the order.[9]

It is of course true, as the Court pointed out in the *Cheney* case (327 U.S. at 388), that the absence of exceptions does not require the court to render a decree "if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce." Thus, the Court may examine the record to satisfy itself that the Board has jurisdiction over the unfair labor practices in question, that the proceedings before the Board were regular, and that the Board was acting within the general scope of its powers under the Act.[10] But, the court may not go further and inquire, for example, into the propriety of the breadth of a particular order entered by the Board, where timely exceptions have not been filed with the Board. *National Labor Relations Board* v. *Cheney California Lumber Co., supra.*

In the *Cheney* case, the trial examiner, after hearing, issued a report finding that the employer had engaged in unfair labor practices and recommending

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[9] See *National Labor Relations Board* v. *Ulin Box and Lumber Co.* (C.A. 7), unreported order entered April 9, 1948; *National Labor Relations Board* v. *Davis Lumber Co.* (C.A. 5), 172 F. 2d 225 (C.A. 5); *National Labor Relations Board* v. *Noroian*, 193 F. 2d 172 (C.A. 9); *National Labor Relations Board* v. *Auburn Curtain Company*, 193 F. 2d 826 (C.A. 1).

[10] See *National Labor Relations Board* v. *Auburn Curtain Company*, *supra.*

that an order issue requiring him to cease and desist from the conduct found and from interfering "in any other manner" with his employees' organizational rights. The employer filed no exceptions to the examiner's report, and the Board thus adopted the examiner's proposed findings and order. In proceedings to enforce the order, the court of appeals, believing that the prohibition against interfering "in any other manner" with the rights of the employees was too broad under the rule established in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, deleted that provision, even though no objection to the phrase had been filed with the Board. This Court reversed, holding that the modification of the order was barred by Section 10(e). Since, in the present case, no objection to the broad order was urged before the Board, the court of appeals was similarly barred under Section 10(e) from modifying the order.

B. Neither the Express Publishing case nor the Communications Workers case supports the court's decree

The court below attempted to find support for modifying the Board order (R. 64–65) in the decisions of this Court in *National Labor Relations Board* v. *Express Publishing Co., supra,* and *Communications Workers* v. *National Labor Relations Board,* 362 U.S. 479. But neither case supports the decree below. In *Communications Workers,* the Board, upon concluding that the union had restrained the employees of Ohio Consolidated Telephone Company, in violation of Section 8(b)(1)(A) of the Act,

ordered the union to cease and desist from engaging in such conduct with respect to the employees of Ohio or "any other employer." Because the record did not show that the union had engaged in, or was likely to engage in, similar misconduct against the employees of other employers, this Court found that, under the principles earlier enunciated in *Express Publishing,* there was insufficient basis for the "any other employer" provision, and accordingly deleted it. Contrary to the situation in the present case, however, in both *Express Publishing* and *Communications Workers,* the Board had specifically considered the scope of the orders, in light of the evidence and findings of record, before arriving at its ultimate decisions. Section 10(e), therefore, interposed no bar to the review of those orders by the courts. The fact that a court may have power to set aside an order in circumstances in which there is no procedural bar to its action does not establish that a court may do likewise when such a bar exists.[11]

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[11] All of the other circuits which have had occasion to consider the problem, with the exception of one panel in the Sixth Circuit (*National Labor Relations Board* v. *Brandman Iron Co.*, 281 F. 2d 797 (C.A. 6), pending on petition for certiorari, No. 35, this Term) have agreed that nothing in *Express Publishing* or *Communications Workers* may be construed as permitting the court to modify a Board order which was not contested before the Board. See *National Labor Relations Board* v. *Enterprise Ass'n*, 285 F. 2d 642, 646–647 (C.A. 2); *National Labor Relations Board* v. *Combined Century Theatres, Inc.*, 46 LRRM 2858 (C.A. 2) (R. 57–58); *Carpenters District Council of Detroit* v. *National Labor Relations Board*, 285 F. 2d 289, 294 (C.A. D.C.); *National Labor Relations Board* v. *Murray Ohio Mfg. Co.*, 279 F. 2d 686 (C.A. 6). See, also, *National*

C. The fact that no objection to the order was urged before the Board precluded the court from modifying the order, even though there was no evidence or factual findings of record to support the order

The court below attempted to distinguish the *Cheney* case on the ground (see R. 64, 66) that here there was nothing in the record to sustain a finding that there would be similar misconduct directed toward other employers or labor organizations, whereas in *Cheney* (R. 66) "[t]he court * * * was careful to point out that findings of record disclosed a 'course of conduct against which such an order may be the only proper remedy.' * * * [327 U.S.] at 389."[12] It is true that in *Cheney*, the evidentiary basis for the order was disclosed in the record. In the present case, however, there was a consent order and a settlement agreement in which the respondents failed to stipulate any facts and specifically dispensed with a full record by waiv-

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Labor Relations Board v. *United Hatters, Cap & Millinery Workers International Union, AFL–CIO*, 288 F. 2d 436 (C.A. 6), on rehearing, scope of order held in abeyance pending decision in the present case, 48 LRRM 2295, 2296–2297 (June 6, 1961).

[12] The Court in *Cheney* did not make an independent finding that the evidence supported the order, as the court below implied, but merely observed that the Board had so found, *i.e.*, the Trial Examiner had made the findings and the Board, in the absence of objection to the findings, had adopted the Examiner's recommended order (see *supra*, pp. 2–3, 10–12). As the Court stated, the order "depends * * * upon evidence found by the Board disclosing a course of conduct against which such an order may be the only proper remedy. The Board here so found." (327 U.S. at 389.) But judicial review of the Board's finding was precluded by the fact that no objection had been urged before the Board (see *infra*, pp. 16–17).

ing "a hearing, an Intermediate Report of a Trial Examiner, the filing of exceptions to such Intermediate Report, oral arguments before the Board, and all further and other proceedings" before the Board (R. 23, par. V; see the Statement, *supra*, p. 4). The Board was entitled to assume from the stipulation that all the necessary underlying facts were conceded and it itself therefore had no occasion or even opportunity to make findings of fact which could serve as a foundation of the order. The procedural difference between the two cases has no relevance, because, in both cases, the enforcing court was precluded under Section 10(e) from reviewing the evidentiary basis of the orders. As the Court in *Cheney* pointed out (327 U.S. at 389), although the "justification" for a broad order "necessarily involves consideration of the facts which are the foundation of the order * * *," the justification

> * * * is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse "the failure or neglect to urge such objection * * *." Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made.[13]

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[13] The only member of the Court in *Cheney* with a different view was Chief Justice Stone who believed that Section 10(e) did not render "the court powerless to frame its own injunction consistently with the record, on which that section requires it to

In summary, the situation here is analytically indistinguishable from *Cheney*. Here, as there, the court of appeals deleted those provisions of the Board's order which it thought unduly broad; those provisions were not necessarily beyond the Board's powers, and would be appropriate under certain circumstances.[14] By failing to contest the order before the Board, the parties in effect agreed that the facts warranted the order and waived their opportunity to have the Board pass on the question. Section 10(e) therefore barred the court of appeals from modifying the order on its own motion.

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act, and in conformity to accepted principles governing the scope of the injunction * * *," but instead was merely "a limitation upon the court's review of the grounds for granting or denying relief" (327 U.S. at 390). Accordingly he sustained the Board's order only after being satisfied, on a review of the record, that a broad order was warranted by the facts presented. Similarly, in the present case, the court of appeals maintained that the "order, when implemented by us, becomes an injunction" (R. 64) and an "injunction broader than the need is not only contrary to established equitable principles, but it is peculiarly inappropriate in the sensitive area of labor relations" (R. 66).

[14] If, for example, evidence were presented which disclosed that the unions here had a consistent policy of requiring all employers in the industry to limit employment to union members, an order prohibiting the unions from engaging in such illegal conduct with respect to the employer involved and "any other employer" would be appropriate. See, *e.g.*, *National Labor Relations Board* v. *Springfield Building and Construction Trades Council*, 262 F. 2d 494, 498–499 (C.A. 1); *National Labor Relations Board* v. *Brewery and Beer Distributor Drivers*, 281 F. 2d 319, 322–323 (C.A. 3).

II

THE FACT THAT THE BOARD'S ORDER WAS ENTERED WITH THE CONSENT OF ALL THE PARTIES PRECLUDED THE COURT BELOW FROM REVIEWING THE ORDER ON THE MERITS

The lack of any evidence or findings of record cannot serve as a basis for the court to modify a Board order entered in accordance with the consent of all parties concerned. Under the practice prevailing in the federal courts, the scope of review of a consent decree is limited to such questions as whether, as a matter of fact [15] or as a matter of law,[16] there is a lack of consent to the decree; whether the decree is invalid for lack of jurisdiction, particularly lack of jurisdiction over the subject matter;[17] whether the consent was obtained by collusion, fraud [18] or mistake;[19] or whether the circumstances which warranted the decree had changed.[20]

But no errors pertaining to the consent decree, which were in law waived by the consent, may be considered on appeal, even though the errors may be

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[15] *Swift & Co.* v. *United States*, 276 U.S. 311, 324; see *Pacific R.R. Co.* v. *Ketchum*, 101 U.S. 289, 295; *Walling* v. *Miller*, 138 F. 2d 629 (C.A. 8), certiorari denied, 321 U.S. 784.

[16] See *Laughlin* v. *Berens*, 118 F. 2d 193 (C.A.D.C.); *In re 4145 Broadway Hotel Co.*, 100 F. 2d 7 (C.A. 7).

[17] See *Swift & Co.* v. *United States*, *supra*, 276 U.S. at 324; *Pacific R.R. Co.* v. *Ketchum*, *supra*, 101 U.S. at 297.

[18] *Swift & Co.* v. *United States*, *supra*, 276 U.S. at 324; see *Thompson* v. *Maxwell Land Grant Co.*, 168 U.S. 451, 463; *Thompson* v. *Maxwell Land Grant Co.*, 95 U.S. 391, 398.

[19] *Swift & Co.* v. *United States*, *supra*, 276 U.S. at 324; see *Wisconsin* v. *Michigan*, 295 U.S. 455, 460.

[20] See *Swift & Co.* v. *United States*, 286 U.S. 106, 114–115.

obvious from the record.[21] Thus in *Swift & Co.* v. *United States*, 276 U.S. 311, 324, and in *Nashville, C. & St. L. Ry. Co.* v. *United States*, 113 U.S. 261, 266, this Court enunciated the rule, which now prevails in the federal courts, that "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." See also *Swift & Co.* v. *United States, supra*, 276 U.S. at 327, 328.

The present case, when the settlement stipulation was approved by the Board, stood in the same posture as though a consent decree had been entered in a judicial proceeding. Since the scope of the order was not jurisdictional and had no relevance to considerations of consent, collusion, fraud, mistake or changed circumstances, the court below erred in reviewing this question. Its action was tantamount to what this Court found in *Swift* should not be done—setting aside or modifying the decree because of its broad scope.

III

IF THE SCOPE OF A CONSENT ORDER WERE OPEN FOR REVIEW ON THE MERITS, THE EFFECTIVENESS OF THE CONSENT PROCEDURE, BY WHICH THE BOARD HANDLES MUCH OF ITS CASELOAD, WOULD BE SERIOUSLY WEAKENED

1. The consequence of precluding a court from reviewing consent orders on their merits is not as

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[21] *Pacific R.R. Co.* v. *Ketchum*, *supra*, 101 U.S. at 295; see, *e.g.*, *Indianapolis, D. & W. Ry. Co.* v. *Sands*, 133 Ind. 433, 32 N.E. 722.

severe as the court below suggests (see R. 67 & n. 6). Long before the *Communications Workers* decision, *supra*, regional officers, who normally negotiate consent decrees, frequently narrowed the scope of proposed orders whenever the respondent was able to establish to the satisfaction of the Regional Director that a broad order was not warranted under the circumstances of the case,[22] and cases have rarely been forced to full hearing over the scope of the order.[23] Since the *Communications Workers* decision, the Board and its agents have been even more alert to insure that broad orders are used only in situations where they are justified by the facts of the particular case.[24]

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[22] Section 10124.3 of the case-handling manual issued to Board field personnel provides that "the remedy provided for in a settlement must not exceed that which would be expected from a fully favorable Board decision."

[23] Where the phrasing of the order is the only thing which blocks settlement, the parties will often stipulate to everything but the proper scope of the order to be entered and submit that issue directly to the Board for resolution without a hearing or intermediate report. See, e.g., *Local Union 522, Lumber Drivers (Republic Wire Corp.)*, 129 NLRB No. 45, 46 LRRM 1551.

[24] See *Central Rigging and Contracting Corp.*, 129 NLRB No. 37, 46 LRRM 1548, 1549; *Combustion Engineering*, 130 NLRB No. 24, 47 LRRM 1301, 1302; *International Hod Carriers, Local 78 (Knowlton Construction Co.)*, 129 NLRB No. 72; *International Brotherhood of Boilermakers, Local 154 (Cuyahoga Wrecking Co.)*, 129 NLRB No. 113, 47 LRRM 1093, 1094; *Pipe Fitters Local 392 (Alco Products)*, 130 NLRB No. 50, 47 LRRM 1354, 1356; *International Union, United Automobile, Aircraft, Agricultural Implement Workers of America, AFL-CIO and Local 899 (John I. Paulding, Inc.)*, 130 NLRB No. 96; *Dal-Tex Optical Co.*, 130 NLRB No. 142; cf. *United Ass'n of Journeymen, Local 469 (W. D. Thomas*

2. On the other hand, the consequence of the position taken by the court below is that no broad order, however appropriate in the particular circumstances, may be obtained without formal litigation, unless the parties stipulate not only to conclusions but also to subsidiary facts. The court acknowledged this consequence in its opinion (R. 68):

> * * * All the Board has to do is to obtain from the respondent a stipulation disclosing facts which warrant broad relief. We will not go behind evidence which the parties state to be so. On the other hand, if the respondents are unwilling so to stipulate, there is no reason for the Board to complain that it cannot have such an injunction without a hearing.

To require that the parties "admit" facts, as a condition for accepting a consent decree, would seriously cripple the effectiveness of the consent procedure.[25] As the Attorney General's Committee on Administrative Procedure pointed out in its final report, respondents are often willing to cease specific

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Construction Co.), 130 NLRB No. 129, 47 LRRM 1484, 1485; *Local Union 522, Lumber Drivers* (*Republic Wire Corp.*), 129 NLRB No. 45, 46 LRRM 1551; *General Drivers, Chauffeurs and Helpers, Local Union No. 886* (*ADA Transit Mix*), 130 NLRB No. 55; *Highway Truckdrivers and Helpers Local No. 107, Teamsters* (*Riss & Co., Inc.*), 130 NLRB No. 91; *Teamsters Union* (*Overnite Transportation Co.*), 130 NLRB No. 108, 47 LRRM 1400, 1402–1403; *Teamsters, Local 810* (*Advance Trucking Corp.*), 131 NLRB No. 10, 47 LRRM 1591, 1593; *Teamsters, Local 294* (*Van Transport Lines, Inc.*), 131 NLRB No. 42, 48 LRRM 1026, 1029.

[25] The importance of consent orders in the administration of the Act is shown by the statistics set forth at pp. 11 and 12 of the Board's petition in *National Labor Relations Board* v. *Brandman Iron Company*, No. 35, this Term.

practices, but at the same time may be unwilling to admit alleged facts "either because they import illegal conduct or because of fear that the admission might be used against them in private litigation." S. Doc. No. 8, 77th Cong., 1st Sess., p. 42. The Committee, in approving of the Board's policy of not requiring factual admissions, specifically stated (*ibid.*): "From the point of view of both the public and the private interest, it seems highly desirable in cases of this sort to permit consent to the entry of an enforceable order without requiring admissions." [**]

In summary, the decision below is out of harmony with the general policy of encouraging settlement agreements and avoiding costly and time-consuming litigation. As the Sixth Circuit stated: "Hindrance rather than aid would be given to expeditious and inexpensive procedure before the National Labor Relations Board were the Courts of Appeals * * * to say that * * * [a respondent] may not lawfully waive the requirement which would otherwise exist, that the Board make findings of fact with respect to unfair labor practices, or that the antagonists may not stipulate concerning the order to be entered by the Board, with its approval." *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380, 384 (C.A. 6), cer-

[**] On the other hand, the Federal Trade Commission has been criticised for its insistence on factual stipulations in consent settlements, on the ground that findings of fact in such situations "are not only unnecessary but act as a deterrent to the accomplishment of greater compliance by voluntary means." See 1 Davis, *Administrative Law Treatise*, § 4.02, at p. 239 (1958). The FTC has since abandoned this requirement.

tiorari denied, 320 U.S. 740. See, also, Administrative Procedure Act, Sec. 5(b), 60 Stat. 239, 5 U.S.C. 1004(b). Moreover, the holding of the court of appeals is contrary to the settled principle that the voluntary solution of the parties, particularly when embodied in an order or decree which there was both jurisdiction and power to enter, should not be rewritten by the court on review.[27]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case should be remanded with directions to enter a decree enforcing the Board's order without modification.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

AUGUST 1961.

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[27] See *Swift & Co.* v. *United States*, *supra*, 276 U.S. at 330–331; *Swift & Co.* v. *United States*, *supra*, 286 U.S. at 116–117, 119; *National Labor Relations Board* v. *Draper Corp.*, 159 F. 2d 294, 298–299 (C.A. 1); *National Labor Relations Board* v. *Retail Clerks, Local 648*, 203 F. 2d 165, 170 (C.A. 9); *National Labor Relations Board* v. *American Mfg. Co.*, 132 F. 2d 740, 742 (C.A. 5); cf. *United States* v. *Wunderlich*, 342 U.S. 98, 100–101.

APPENDIX

National Labor Relations Act

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has or may be established by agreement, law or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * In case the evidence is presented befor a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners * * * shall issue * * * a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof * * * such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD

SEC. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment,

except where time, the nature of the proceeding, and the public interest do not permit.

(b) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington, D.C. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulations also contain the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(c) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition that court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

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SEC. 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.*—(a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(c) of the act and section 102.113 and section 102.114 of these rules) file with the Board in Washington, D.C., seven copies of a statement in writing setting forth excep-

tions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with seven copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file seven copies of a brief in support of the intermediate report and recommended order. Copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation *of page and line* the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave or for extension of the time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties. Requests for an extension must be received by the Board 3 days prior to the due date.

(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding.

(c) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions filed pursuant to the provisions of paragraph (a) of this section with proof of service on all other parties furnished with such request. The Board shall notify the parties of the time and place of oral argument, if such permission is granted.

(d) Oral arguments are limited to 30 minutes for each party entitled to participate. No request for

additional time will be granted unless timely application is made in advance of oral argument.

(e) Exceptions to intermediate reports and recommended orders, or to the record, briefs in support of exceptions, and briefs in support of intermediate reports and recommended orders shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

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